

1                               IN THE UNITED STATES DISTRICT COURT  
2                               FOR THE DISTRICT OF OREGON

3           LEUPOLD & STEVENS, INC.,                               )  
4   )  
5                               Plaintiff,                               ) No. 3:16-cv-01570-HZ  
6                               vs.                                       ) January 11, 2019  
7   )  
8           LIGHTFORCE USA, INC. doing                               ) Portland, Oregon  
9           business as NIGHTFORCE OPTICS                               )  
10           doing business as NIGHTFORCE                               )  
11           USA,   )  
12   )  
13                               Defendant.                               )  
14           -----

15                               **CONTINUED MOTION HEARING**

16                               **DAY 2**

17                               TRANSCRIPT OF PROCEEDINGS

18                               BEFORE THE HONORABLE MARCO A. HERNANDEZ

19                               UNITED STATES DISTRICT COURT JUDGE  
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## APPEARANCES

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1 P R O C E E D I N G S

2 THE COURT: Good morning. Be seated.

3 THE CLERK: Your Honor, we're here today for a  
4 continuation of oral argument on the parties' cross-motions  
5 for summary judgment in the matter of Leupold & Stevens, Inc.,  
6 versus Lightforce, Inc., Case No. 16-cv-1570.

7 Counsel, please state your appearances for the  
8 record.

9 MR. PARK: Good morning.

10 For the plaintiff, Brian Park. And we also have a  
11 client representative again, Mikael Crowther, in the gallery,  
12 who is the legal manager for Leupold & Stevens.

13 MR. BRUNETTE: Nathan Brunette.

14 MR. WILLIAMS: Billy Williams.

15 MR. DAVIS: And Scott Davis for defendant.

16 MR. CASIMIR: David Casimir for defendant.

17 THE COURT: There's a whole bunch of other people  
18 back there.

19 MR. SIEGEL: I'm Todd Siegel from Klarquist for  
20 defendant.

21 MR. BOND: Jason Bond for the defendant.

22 MS. BROW: Mary Ann Brow for defendant.

23 MR. FERRIS: Kassim Ferris for plaintiff.

24 THE COURT: Well, welcome to all of you.

25 Let me just get my computer going. This is the

1 realtime. In case I miss something that you said, I can look  
2 over at my screen and see what it is I missed.

3 (The Court and the court reporter confer off the  
4 record.)

5 THE COURT: We're going to be talking actuators  
6 today, ridges, and all kinds of things, cam followers, pins,  
7 bushings. All good.

8 (There is a brief pause in the proceedings.)

9 THE COURT: Let's see. There we go.

10 I don't know if you all discussed how you want to  
11 proceed. I'm okay with whatever agreement you reach between  
12 each other about how to proceed this morning and through the  
13 day.

14 Mr. Park?

15 MR. PARK: Yes, Your Honor.

16 At the last installment of the hearing, we conferred  
17 with the other side. We thought it would make sense to start  
18 with the same ping-ponging back and forth. We thought it  
19 would make sense to dive into the '907 patent today, with  
20 Mr. Brunette leading off, followed by the other side  
21 responding, and back and forth and so forth until that one is  
22 completed.

23 And then from there, we would move on to the five  
24 locking turret knob patents.

25 THE COURT: You think you're going to finish the '907

1 today?

2 MR. PARK: Yes. We certainly hope so.

3 THE COURT: So do I.

4 All right. That's acceptable to the defense?

5 MR. CASIMIR: It is.

6 THE COURT: All right.

7 Mr. Brunette, you're up.

8 MR. BRUNETTE: Your Honor, before I get started, I  
9 have a copy of our slides that I will give to opposing  
10 counsel.

11 Would the Court like a copy?

12 THE COURT: Sure. That's really helpful to me, when  
13 I get copies.

14 MR. BRUNETTE: (Hanging).

15 Okay. Your Honor, starting with the '907 patent this  
16 morning, which I think has the most issues, to briefly  
17 overview the way I hope to tackle them, we would start with  
18 the issue of infringement and talk about pin and actuator, the  
19 two issues there. That is an issue on which only Leupold is  
20 moving for summary judgment.

21 Then I'll be turning to four issues on which there  
22 are cross-motions for summary judgment -- the date of  
23 invention issue, the entitlement to provisional priority  
24 issue, the certificate of correction issue, and equitable  
25 estoppel -- those all being defenses of Nightforce where the

1 parties are cross moving.

2 And then after that, there are two more Nightforce  
3 defenses where only Leupold is moving for summary judgment;  
4 and those are the Altenheiner patent defenses and the  
5 Schmidt & Bender device defenses.

6 THE COURT: Okay.

7 MR. BRUNETTE: So diving right in on infringement,  
8 there are only two issues here, as I said a moment ago. They  
9 turn on the proper understanding of the term "pin" and the  
10 proper understanding of the term "actuator."

11 Of course, the claim construction of those terms is  
12 a legal issue. And once that legal issue is resolved, that's  
13 the end of the discussion of infringement from our  
14 perspective. There simply is no factual dispute as to what  
15 the structure of the accused products is or how they work.  
16 It's only about what does the claim term mean; and, thus, is  
17 it in the undisputed facts or isn't it.

18 We presented the testimony of Leupold's expert,  
19 Mr. Byron. I don't intend to talk extensively about that  
20 today, since Leupold is the only one moving for summary  
21 judgment. I plan to focus more on the testimony of  
22 Nightforce's personnel and their expert to show why there is  
23 no dispute here.

24 And, critically, Nightforce's expert,  
25 Mr. Brandenburg, admits that the Nightforce products include a

1 pin. In fact, he used that term himself, voluntarily, to  
2 describe the accused structure in those products.

3 So turning to the first image here, this is from a  
4 set of Nightforce assembly instructions. And it shows how the  
5 accused products go together and, thus, what is inside of  
6 them. And we are talking in particular about item 6 in this  
7 figure, which I've called out with a red box. That is a pin.

8 It gets threaded into -- it's a little bit difficult  
9 to see, certainly from the glare that I have on this monitor,  
10 but if you follow the line, it threads into a hole in an arm  
11 that extends up through that hole in the scope. You can kind  
12 of see a light gray circle.

13 There are threads on the right side of that pin that  
14 engage into the hole in that follower arm. If you follow the  
15 follower arm down into the riflescope body, it is attached to  
16 a focus lens.

17 And then once that is screwed into place, part 7,  
18 which is a bushing, goes around the pin. And the pin then  
19 engages into the spiral cam track.

20 And I'll flip to the next picture here, where you can  
21 see the spiral cam track in the figure on the left -- it's  
22 labeled "inward face of focus helix" -- and part 7, which was  
23 that bushing with the pin inside of it, sticking out from the  
24 scope now that it's screwed into place.

25 So when you turn that focus helix around and stick it

1 over that hole in the scope to make the turret, the pin part  
2 and the bushing, together the cam follower, extend into that  
3 groove. And as you turn the knob, that causes the focus helix  
4 part to turn.

5 And, as you can see, the radius between the inside of  
6 the focus helix groove way down at the bottom is really small;  
7 and the radius between the hole and the groove way out at the  
8 left side, all the way around on the other side, is really  
9 considerably wider. And so that pushes the pin back and forth  
10 laterally, and that pushes the arm back and forth laterally,  
11 which pushes the lens back and forth laterally, adjusting the  
12 parallax focus of the scope.

13 Moving ahead to the testimony, this slide is  
14 testimony from the Rule 30(b)(6) deposition of Nightforce's  
15 designee, Klaus Johnson. He was asked, is there any  
16 difference between the various Nightforce products, and  
17 testified that, yes, there are differences, but the only  
18 differences that could possibly be relevant to infringement as  
19 to the '907 patent are as to the specific shape of that spiral  
20 cam, how many degrees around it goes, how much a degree of  
21 rotation changes the amount of lateral movement of the pin.

22 There's no other difference as to what the pin looks  
23 like or how the focus arm works or any of that. That's all  
24 the same across all of the accused products. There's been no  
25 argument from Nightforce that there's any difference between



1 the accused products. They all rise or fall together.

2 So then moving ahead, this next slide is Nightforce's  
3 expert on the '907 patent. They hold out Allen Brandenburg as  
4 their expert. And he's asked -- so the first question here,  
5 starting at line 17, we're referring to the same figure that I  
6 put up first, the picture of that pin and the bushing and how  
7 they go together in the scope.

8 And I asked, How do -- how are those two parts -- in  
9 other words, the pin and the bushing -- joined together?

10 He answers, "If that's a bushing and it's assembled  
11 over a pin, I can assume that it's a slide fit over the pin,"  
12 recognizing on his own, without prompting, without the words  
13 being put into his mouth, that that part No. 6 is a pin.

14 And then just following up on that, to make sure  
15 we're all clear, "You would consider the elongated head to  
16 that screw a pin?"

17 At that point he realizes that he has just used the  
18 claim language to describe the accused product and tries to  
19 backpedal a little bit and says, "Well . . . do you mean a  
20 'pin' as defined in the patent?"

21 And I say, You just used the word "pin." I was  
22 asking to make sure that's what you meant.

23 And he says, "I'll change it to a post."

24 Then we follow up: Do you understand there to be a  
25 difference between "pin" and "post"?

1           And he says, Well, I don't want to use the claim  
2     language. I want to use a different word, okay.

3           Ultimately he comes down to, is there a difference?

4           Well, "pin" might be a little bit narrower than  
5     "post," because he thinks that pin needs to be metallic.

6           It's not at all clear where he's getting that from.  
7     It is not the construction that the parties discussed and came  
8     to a tentative agreement on. It is certainly not the  
9     construction that is advocated in Mr. Byron's report, which is  
10    a solid, rigid protruding structure. I believe it's a short,  
11    solid, rigid protruding structure. I may have the order of  
12    those wrong. That's what we think that "pin" means.

13          And there's certainly nothing in the '907 patent that  
14    says that the pin needs to be metallic.

15          But, regardless, the claim construction almost isn't  
16    necessary to resolve to the extent that there's a difference  
17    between the experts, because everybody agrees, as  
18    Mr. Brandenburg said when we started the conversation, before  
19    he was prompted and before he thought about the legal  
20    ramifications of what he was saying, part No. 6 is a pin. And  
21    the claim language for Claims 6 and 16 that this relates to  
22    simply requires that the cam follower includes a pin.

23          There is no question that the parts 6 and 7 together  
24    engage in the groove and are a cam follower. There is no  
25    question that that part includes a pin. And on that basis, we

1 think that summary judgment of infringement as to the pin  
2 issue is appropriate.

3 THE COURT: Is there -- at some point, are we going  
4 to have a conversation about what a "groove" is or is not?

5 MR. BRUNETTE: I'm not exactly certain when we would  
6 have a conversation about what "groove" is or is not, although  
7 I would say "cam track" is a term that the Court has  
8 construed.

9 THE COURT: Right.

10 MR. BRUNETTE: And it is --

11 THE COURT: Well, you just used the word "groove."  
12 And I'm not -- and I see the word "groove" throughout your  
13 paperwork in a couple of places, as I recall. And I was  
14 curious about how you all were using that word. If you're  
15 talking about the cam track and that's the groove --

16 MR. BRUNETTE: That's correct, Your Honor, yes.

17 We use "groove" as an embodiment of the cam track.  
18 Now, the claim language for Claims 6 and 16 doesn't just add  
19 to the base Claim 1 and 10 the requirement that the cam  
20 follower includes a pin. It also requires that the cam track  
21 includes a groove.

22 There has not been any dispute on that issue in the  
23 briefing. I don't -- as far as I understand it, Nightforce is  
24 not contesting that their products, the inward face of that  
25 focus helix, that the cam track cut into that is, in fact, a

1 groove; in other words, I would say a recessed area, recessed  
2 below the drive face --

3 THE COURT: Okay.

4 MR. BRUNETTE: -- which is also a term we construe.

5 THE COURT: And, again, maybe I'm just giving you all  
6 a heads up about something that I was just puzzled about; and  
7 that is there was some discussion in the briefing, as I  
8 recall, between whether or not a track is simply the inverse  
9 of something that's cut out or not or sits on top of it, and  
10 how all of that -- whether either one of those might be a  
11 groove or not and whether it makes any difference.

12 I don't know. I just remember kind of reading  
13 through all of that. And maybe that's a conversation that's  
14 going to happen later on when we talk about the cam track.

15 MR. BRUNETTE: Your Honor, yes.

16 I think the short answer is there will be a  
17 conversation about that. It is -- it is part of the  
18 conversation about priority entitlement with respect to the  
19 claims other than 6 and 16, which have to do with whether the  
20 provisional application discloses a ridge or rail embodiment  
21 to a person skilled in the art.

22 THE COURT: Okay.

23 MR. BRUNETTE: Because the provisional definitely has  
24 at least a groove, and we think that a person skilled in the  
25 art would understand the inverse of a groove as well. But

1     that's where that inverse of a groove comes in.

2             THE COURT: Thank you. All right.

3             MR. BRUNETTE: So moving to the second infringement  
4     issue --

5             THE COURT: All right.

6             MR. BRUNETTE: -- actuator. So this has to do with  
7     both Claim 1 and Claim 10 and, therefore, all asserted claims  
8     of the '907 patent.

9             The undisputed evidence shows that the structure of  
10    the accused products is what it is. Again, we can refer back  
11    to that testimony of Mr. Johnson. There is no difference  
12    between the different products.

13            Mr. Brandenburg admits that he's taken a very narrow  
14    interpretation of what "actuator" means; and, in fact, not  
15    just narrow, but limited to the specific Part 122 called out  
16    in the specification.

17            There is also no question that the Court has already  
18    heard this issue. We debated about the meaning of the term  
19    "actuator" back at the *Markman* hearing. And at that hearing  
20    Nightforce took the position that "actuator" was limited to  
21    the specific embodiments shown in the specification. We  
22    argued that it was not and that "actuator" should be given its  
23    full broad plain and ordinary meaning.

24            The Court agreed with Leupold on that issue and how  
25    that actuator is entitled to its plain and ordinary meaning

1 and is not limited to the specific embodiments shown in the  
2 specification. Now, Mr. Brandenburg disagrees with the Court  
3 on that, but that is not an expert opinion that could overcome  
4 summary judgment.

5 So going through some of the testimony on this --  
6 this is from Mr. Brandenburg's deposition transcript. We had  
7 a conversation -- and it's cited in the briefing; I don't want  
8 to put it all up because it's somewhat more lengthy -- before  
9 this part that I'm quoting now, where we talked with him about  
10 his understanding of the term "actuator," divorced from the  
11 '907 patent, just the ordinary English word "actuator." And  
12 he agreed that it has a plain and ordinary meaning and it's  
13 relatively broad.

14 Then he says, Well, in the context of the '907  
15 patent, I have a narrower understanding of "actuator." And he  
16 says it's based on Part 122 shown in the specification.

17 So I asked him, Is it your understanding that it's  
18 limited to Part 122?

19 He says, I wouldn't say it -- it narrows the general  
20 application, but it defines what it is in the patent.

21 And so I say, So that's -- you're taking the position  
22 that the cam -- that the actuator is limited to Part 122 shown  
23 in the specification, asking, "The understanding of the claim  
24 construction of actuator" --

25 THE COURT: You're going to need to slow down.

1 MR. BRUNETTE: I'm sorry.

2 "That's the understanding of the claim construction  
3 of actuator that you used in forming your non-infringement --

4 "Yes.

5 -- "conclusions?"

6 And then he clarifies: "I concluded that the part  
7 they called out as an actuator was what they meant as an  
8 actuator.

9 "Specifically Part 122?

10 "Yes."

11 So it's very clear that Mr. Brandenburg's point of  
12 non-infringement is based on his opinion that the proper  
13 construction of "actuator" is limited to Part 122 as called  
14 out in the specification.

15 Here is a brief excerpt from the Court's *Markman*  
16 order. There are three stars in the middle, so these were on  
17 different pages. At the top the Court is describing what  
18 Nightforce's argument was there, which is that "actuator" is  
19 limited to what's called out in the specification. At the  
20 bottom is the Court's conclusion rejecting that argument.

21 So "actuator" is entitled to its plain and ordinary  
22 meaning and is not limited to the specific embodiments  
23 discussed in the specification.

24 So let's look at what the claim language actually  
25 requires here, because Nightforce wants to argue -- at least

1 in their reply brief they come back and say, Well, look, we're  
2 not really making the argument that Mr. Brandenburg made,  
3 which is that "actuator" is limited to Part 122. What we  
4 really want to argue here is that the actuator has to be  
5 outside the housing of the scope and that the actuator has to  
6 be directly attached to slide along the housing of the scope.

7 That argument does not work with the claim language.  
8 So here's the language of Claim 1. I've highlighted the  
9 relevant part, which is the only part that talks about where  
10 the actuator is with respect to the housing or how it attaches  
11 to the housing. And all it says is "an actuator slidably  
12 mounted for movement along the longitudinal axis of the  
13 housing."

14 Nothing about that language requires the actuator to  
15 be outside the housing. Nothing about that language requires  
16 the actuator to be mounted to the housing, only that it is  
17 mounted to something in a manner that allows it to move along  
18 the axis of the housing.

19 There is no dispute that the actuator in the  
20 Nightforce product slidably moves along the housing. That is  
21 all that is required.

22 In any event, the actuator in fact does stick out  
23 from the housing, as we saw in the pictures we looked at a few  
24 moments ago, because the cam follower is defined in the claims  
25 as a part of the actuator; and the cam follower sticks out



1 through that hole in the scope to engage into the spiral cam  
2 helix. But the Court need not reach that issue because the  
3 claim language doesn't require it in any event.

4 THE COURT: I lost you as to what you are defining as  
5 the actuator itself. Is it the pin?

6 MR. BRUNETTE: So the actuator, as defined in the  
7 patent is -- includes -- the cam follower is a part of the  
8 actuator.

9 THE COURT: Okay.

10 MR. BRUNETTE: So we think the actuator includes at  
11 least that pin and probably also some part of that arm that it  
12 attaches into.

13 It is not critical how much of that is or isn't an  
14 actuator. It doesn't really matter. The pin slides back and  
15 forth. And whether the arm is a mounting structure or is part  
16 of the actuator we don't see as relevant.

17 THE COURT: Okay.

18 MR. BRUNETTE: With that, we think we're done on  
19 infringement.

20 THE COURT: All right.

21 MR. BRUNETTE: Those are the only two issues. I'm  
22 happy to come back to it if there are questions after  
23 Nightforce's presentation. We'll move on to the defenses.

24 Oh, just to flag for the Court -- I'm sorry. I  
25 missed this slide. Any dispute about the scope of the meaning

1 of the term "actuator" or of the term "pin" is a legal dispute  
2 that does not preclude summary judgment. Here are two cases  
3 where there were disputes about claim construction that the  
4 Court properly resolved on summary judgment and then entered  
5 summary judgment based on the proper claim construction.

6 THE COURT: All right.

7 MR. BRUNETTE: Our next question is date of the  
8 invention. So this is one of the four Nightforce defenses on  
9 which the parties cross-moved for summary judgment.

10 Our position is that Mr. Otteman invented his spiral  
11 cam focus mechanism before March 1998. The reason everybody  
12 keeps talking about March 1998 is that that is the date of a  
13 claimed prior art reference. It's the German utility model  
14 that everybody keeps talking about with the number that starts  
15 with the letters "DE."

16 And the critical dispute about that reference is  
17 whether it is prior art or whether it is not prior art. And  
18 that turns both on priority entitlement back to the  
19 provisional and the date of the invention, but I want to  
20 separate them and talk about them separately because it's  
21 possible that one of them might be -- that the Court may  
22 ultimately decide to enter summary judgment on one and not the  
23 other or may view them differently, so we'll talk about them  
24 separately.

25 We believe that there is ample evidence demonstrating

1 that Mr. Otteman invented the claimed spiral cam focus  
2 mechanism much earlier than 1998. In fact, there is clear  
3 documentary evidence showing that he did so in 1995. So  
4 there's certainly no room for dispute that it was well before  
5 1998.

6 So starting with the law on entitlement to an  
7 invention date, there is a rule of reason standard and a  
8 corroboration requirement, and corroboration is judged under  
9 that rule of reason standard.

10 So under the rule of reason, although some  
11 corroboration of inventor testimony is required, if inventor  
12 testimony is used to prove the date of invention, there is no  
13 requirement to ignore all of the inventor's testimony. The  
14 inventor's testimony can still be used. Nightforce's brief  
15 suggests we just throw out all of the inventor's testimony and  
16 look at what else there is. That is not the standard.

17 It is -- the ultimate question is whether the  
18 inventor's testimony, plus whatever corroboration there is, is  
19 sufficient that a reasonable juror could find that there has  
20 been invention before the date of the prior art reference.

21 Second, there is no requirement to corroborate every  
22 step or every claim element. So we don't have to show every  
23 single thing that Mr. Otteman did in coming up with the  
24 invention and reducing it to practice through corroboration.  
25 There just needs to be enough corroboration overall that the

1 story is believable.

2 We consider the totality of the evidence, not  
3 individual documents. So the fact that an individual document  
4 does not tell the whole story does not mean that it is not  
5 corroborating.

6 And circumstantial evidence is sufficient. We don't  
7 need to have an independent over-the-shoulder observer  
8 watching the expert. We can look at circumstantial evidence.

9 And here are three cases, all of which talk about how  
10 this works. In *Fleming*, for example, corroboration of  
11 reduction to practice was found based on circumstantial  
12 evidence, even though the Federal Circuit expressly recognized  
13 that none of the corroborating evidence definitively proved  
14 the inventor's account and none of it disclosed each claim  
15 limitation. So some claim limitations were not in the  
16 corroboration, but corroboration was still found and there was  
17 sufficient evidence.

18 Similarly, in *Cooper* corroboration was found based on  
19 circumstantial evidence, even though not every claim element  
20 was shown in the corroborating evidence.

21 And in *Loral* corroboration was found on  
22 circumstantial evidence, even though there was no direct proof  
23 that any prototype had been made. There was only  
24 circumstantial evidence of a mask, which is a form of tooling,  
25 which would have been consistent with having made the

1 prototype, but did not prove that that mask was every actually  
2 used to make a prototype, plus the mere contemporaneous  
3 documents shortly after the fact that claimed, in marketing to  
4 third parties, the ability to practice the invention.

5 So what we can draw from these cases is there is a  
6 corroboration requirement, but it does not require direct  
7 proof of every element of the claims. And the *Mahurkar* case  
8 that we cited in our briefing talks extensively about how the  
9 burden shifts back and forth between the parties.

10 So it is clear that Nightforce is the party asserting  
11 invalidity. Nightforce always has the burden to prove  
12 invalidity by clear and convincing evidence.

13 Leupold, as the party asserting invention prior to  
14 its patent filing date, has the burden of production to come  
15 forward with sufficient evidence that a rational juror could  
16 find that the invention took place before March 1998. As soon  
17 as we cross the threshold that a rational juror could find in  
18 favor of Leupold on this question, the burden shifts back to  
19 Nightforce to persuade the trier of fact that it did not  
20 happen. And the applicable burden there is the clear and  
21 convincing evidence standard to prove invalidity.

22 So the question we're asking today is twofold,  
23 because there are cross-motions for summary judgment: Is  
24 there at least enough evidence that a rational juror could  
25 find, drawing all inferences in Leupold's favor, that

1 Mr. Otteman invented before March 1998? And we think the  
2 answer to that is definitively yes.

3 And then the second question for Leupold's motion:  
4 Drawing the inferences in Nightforce's favor, would a rational  
5 juror still have to find that the invention was invented  
6 before 1998? In other words, that Nightforce does not  
7 disprove corroboration of the invention before 1998, under the  
8 clear and convincing evidence standard.

9 So flipping forward to the testimony, to take a look  
10 at what evidence there is to meet this standard, Mr. Otteman  
11 testified that he created electronic drawings of the invention  
12 the summer of 1995. He testified that he sent those  
13 electronic drawings to a third-party company called Ideality  
14 and specifically to Ric Landvatter, who worked at Ideality at  
15 the time, for production of the prototype spiral cam parts.  
16 The critical -- the part with the helix in it and the follower  
17 were plastic parts in the prototype and in Leupold's  
18 embodiment that were made for the prototype by Ideality.

19 And Mr. Otteman testified that he got those parts  
20 back from Mr. Landvatter and assembled them into a complete  
21 prototype scope and confirmed that the focus mechanism  
22 actually operated. He said all of that, and the citations  
23 here are to his deposition transcript.

24 It was a bit of an issue. So before his deposition,  
25 his testimony was reduced to a declaration, and that

1 declaration was provided to Nightforce so they would  
2 understand what he was going to say and there would not be any  
3 claim of surprise about what his testimony was. And he relied  
4 on that declaration during his testimony, because there were a  
5 number of exhibits attached to it. So he would refer to the  
6 exhibits that were all put together with his declaration. But  
7 he testified to this live and under oath at his deposition,  
8 and that's what we're citing to on this slide.

9           There are also citations to his affidavit testimony,  
10 which are proper on summary judgment. But it is all confirmed  
11 in the deposition transcript itself.

12           And it's clear from his testimony that all of this  
13 took place in 1995. And then he hedges a little bit and says,  
14 "I don't fully remember. I'm looking at the documents, and  
15 the documents seem to say it's summer of 1995. But at the  
16 latest, it would have been early 1996."

17           This all happened pretty quickly after he finished up  
18 the electronic drawings. There is no question that this  
19 happened long, long before March of 1998.

20           That's the inventor testimony. And that inventor  
21 testimony, absent the corroboration requirement, right there  
22 should be sufficient to overcome summary judgment.

23           So the question is: Is there at least enough  
24 circumstantial evidence to corroborate that inventor  
25 testimony, put together with the inventor testimony, to make

1 the story believable to a rational juror, drawing all  
2 inferences in Leupold's favor for our motion and in  
3 Nightforce's favor -- or in Leupold's favor for their motion,  
4 in Nightforce's motion for our motion?

5 So the first things are specific dated CAD drawings  
6 that corroborate Mr. Otteman's testimony. We have the very  
7 CAD drawings that he created in July of 1995. We know we have  
8 the right CAD drawings because they were preserved on a backup  
9 CD that was was created on June 27, 1996, critically, almost  
10 two years before March 1998.

11 And Nightforce argues, well, those drawings show  
12 conception, but not reduction to practice. But, in fact, at  
13 least as circumstantial evidence, the drawings are much more  
14 important than just that. They corroborate Mr. Otteman's  
15 testimony about when he created the drawings, but he also said  
16 he took these drawings and sent them to Ideality.

17 So the fact these drawings exist and are dated to  
18 1995 and that they were backed up in 1996 and had, at that  
19 time, a last change date in July of 1995 -- so almost a year  
20 later the files are unchanged -- is certainly circumstantial  
21 evidence to show that this all happened immediately after the  
22 drawings were created, just as Mr. Otteman testified.

23 So these drawings sat on the computer for a year,  
24 then were backed up in 1996. Certainly at some time in there,  
25 consistent with Mr. Otteman's testimony, they were sent to



1 Mr. Landvatter.

2 And so here is a picture that was produced in the  
3 case and is in the summary judgment record of the backup CD,  
4 but we actually also produced all the files off the backup CD.

5 And here is a picture of the data off of the backup  
6 CD showing -- these are not all of the files. There are more  
7 relevant files on there, but here is an example of two of  
8 them, spiral cam 1.1 and spiral cam 1A.1, both dated from  
9 July 26, 1995, their last change date.

10 And there's a bit of a question about the endings on  
11 those files, because the original files would have had  
12 extensions for the CAD system in between the first dot and the  
13 dot 1. The dot 1 is the version history. It appears that  
14 that was cut out in the process of creating the backup CD in  
15 1996, because a faxed copy of the data drawn from the system  
16 that Mr. Otteman sent around in 1998, which is in the record,  
17 has those extensions, but the backup CD created in 1996 does  
18 not.

19 Nightforce at one point took the position, well, we  
20 don't know for sure that these files, without the extensions,  
21 are real or date to before 1998. But there's no question  
22 about that, because these files, without the extension, were  
23 created -- or were archived in 1996. So we know the CD was  
24 created and burned at that time.

25 In addition to having these drawing files that we can

1 definitively date to 1996 -- and I would add, there is also an  
2 independent corroborating witness, Mr. Hammond, who is a  
3 custodian of record at Leupold, who backs up that this disc is  
4 a disc created in 1996 and maintained in the course of  
5 Leupold's business. Although he is a Leupold employee, for  
6 purposes of corroboration Leupold employees count as being  
7 separate and independent because they are not the inventor  
8 himself.

9           So, in addition, we have a true third party,  
10 Mr. Landvatter, the gentleman from Ideality who actually  
11 produced the spiral cam parts. We took his deposition. He's  
12 a third party with no financial interest in the case. He  
13 built the prototypes. And he confirms Mr. Otteman's testimony  
14 about what was done and the dates that it was done.

15           He also confirms that a series of contemporaneous or  
16 near-contemporaneous financial records from Leupold showing  
17 the financial transactions associated with making that  
18 prototype would have related to that prototype. So he  
19 authenticates those documents as well, which is further  
20 corroboration.

21           Just scanning through a few examples of his  
22 testimony, here he takes a look through a variety of the  
23 documents associated with Mr. Otteman's testimony and recalls  
24 that he would have built the parts, driven them to Leupold's  
25 offices to deliver them to Mr. Otteman. And although he

1 didn't understand all of the inner workings of the scope that  
2 they were going into, he knew they were going into a  
3 riflescope and that they were going to be used to adjust the  
4 focus of the -- adjust a lens; in other words, adjust focus.  
5 So he confirms the point of the invention and what this  
6 relates to, the parts that he was making at this time.

7           There's also clear testimony that this happened in  
8 1995 or early 1996. I would direct the Court in particular to  
9 the last two lines that are up on this slide, slide 26. He's  
10 shown Mr. Otteman's declaration. He reads through the  
11 description of when the reduction to practice happens, and he  
12 says, "It's -- I could agree with everything he has said  
13 here."

14           That is the essence of corroboration. That testimony  
15 from a third party is sufficient that a rational jury,  
16 certainly drawing all inferences in Leupold's favor, could  
17 find that Mr. Otteman's testimony is credible and  
18 corroborated.

19           In addition, he's asked about the financial records.  
20 And I have two slides of this, because he goes through  
21 different packets of invoices. They're actually purged  
22 records of invoices, so -- the original invoices no longer  
23 exist because they're so old. But when they were -- when  
24 those records were removed from the company, records were kept  
25 of what the basic data of the invoice was. And these paper

1 records were found in paper archives of Leupold's. There's a  
2 declaration attesting to what these are and where they came  
3 from from Mr. Dugan, the CFO of Leupold.

4 And, in addition, Mr. Landvatter testifies -- this  
5 one isn't on a slide, but it's in his transcript at 30 -- that  
6 he recalled that the spiral cam was one of the earliest  
7 projects that he did for Leupold.

8 So he looks back through these invoices and  
9 ultimately concludes -- "Do you think all of these would have  
10 been related to the spiral cam project?

11 "Yeah.

12 "Okay.

13 "Yes."

14 He's quite clear that he thinks these would have been  
15 related to the spiral cam project and these are transactions  
16 from 1995, and he's also quite clear that the spiral cam  
17 project was one of the very earliest projects that he did for  
18 Leupold, which also undermines Nightforce's argument that all  
19 of this really took place in late 1998 or early 1999.

20 Nightforce's fallback argument is even if you believe  
21 that all of this happened, they say, "Well, there's no  
22 evidence that Mr. Otteman actually tested the scope to see if  
23 it worked, because we haven't seen any test report. Where is  
24 the corroboration? Where is the documentation that testing  
25 actually occurred?"

1           And there are two arguments here. There's a legal  
2     argument and a factual argument. The legal side of the  
3     argument is, under the *Slip Track Systems* case from the  
4     Federal Circuit in 2002, testing is not required for an  
5     invention that's mechanical and that is sufficiently simple  
6     that a person of skill in the art, when they build the  
7     prototype, would automatically, in the course of building the  
8     prototype, already know that the invention works.

9           The invention in *Slip Track Systems* is a drywall  
10    bracket that hangs drywall that has some give in it. And it  
11    is designed for use in places where there are earthquakes, so  
12    that when there is a minor earthquake, the drywall can slide  
13    back and forth slightly in the hanger track and does not  
14    crack.

15           And in that case there was no evidence of testing,  
16    but the Federal Circuit said, well, it wasn't necessary to  
17    test the bracket because by the time you built the prototype  
18    bracket and stuck it on a piece of drywall, you would already  
19    know, without any formal testing needed, that there was play  
20    between the bracket and drywall, or even just by measuring the  
21    bracket. You wouldn't have to put it on drywall. You would  
22    know the thickness of the piece of drywall and therefore know  
23    that there would be play and therefore know that the invention  
24    would work to have play. You don't have to test it in an  
25    actual earthquake or a simulated earthquake to know that the

1 plaster won't crack. The point of the invention is just that  
2 it is a bracket that allows play to reduce the chance of  
3 cracking.

4 The same is true here. By the time Mr. Otteman put  
5 together the parts that we -- his equivalent of the parts that  
6 we saw, a cam hub with a groove in a spiral and a pin sticking  
7 up into that groove, there's no question that he would have  
8 known that it would work to move the focus lens. And  
9 Mr. Byron says that in his rebuttal report.

10 But the Court need not resolve that argument, in any  
11 event, because there is evidence that it was -- that there was  
12 testing to confirm that the prototype scope worked.  
13 Mr. Otteman said that.

14 And, in addition, Mr. Landvatter confirms that  
15 Mr. Otteman contemporaneously told him that the spiral cam  
16 prototype worked for its intended purpose. There are three  
17 cites to Mr. Landvatter's transcript here, at 49, 69, and 76,  
18 where he says that.

19 And this lines up exactly with the *Cooper* case that  
20 I cited earlier. The same thing happens there. There is no  
21 direct evidence that the inventor tested his invention at the  
22 time of the prototype, but what there was was evidence from  
23 someone who was working with him at the time, who said, "Well,  
24 the inventor told me contemporaneously that he had tested it  
25 and that the fiber length was of the right length." That's

1 consistent with Mr. Landvatter's testimony here.

2 Now, in a footnote of its response brief, Nightforce  
3 argues, well, this testimony from Mr. Landvatter is nice, but  
4 that's hearsay and the Court shouldn't consider it. We  
5 responded to that in our evidentiary surreply.

6 But just briefly, to follow up on that, this is  
7 exactly the same as the evidence that was allowed in *Cooper*.  
8 And it qualifies for a hearsay exception both because -- so  
9 Mr. Otteman's -- or Mr. Landvatter's testimony about what he  
10 heard is proper testimony because he was speaking at a  
11 deposition. And Mr. Otteman's statement that he's testifying  
12 to was a present sense impression, explaining that his product  
13 worked and, in any event, is admissible as a prior consistent  
14 statement, because by challenging Mr. Otteman's invention  
15 story and demanding corroboration, Nightforce is calling into  
16 question the veracity of Mr. Otteman's claims that he tested  
17 the scope; and, therefore, we're allowed to use a prior  
18 consistent statement. So under either of those exceptions,  
19 this testimony comes in.

20 The other evidentiary issue on this question of  
21 inventorship is a sham affidavit objection. So while we're on  
22 evidentiary questions, I'll address that briefly. Again, our  
23 response to this issue is spelled out in our evidentiary  
24 surreply.

25 Nightforce asserts that the supplemental declaration

1 of Mr. Byron and the declaration of Mr. Otteman are sham  
2 affidavits. This is particularly problematic as to  
3 Mr. Otteman's declaration because his declaration precedes the  
4 testimony that Nightforce says makes it a sham.

5 And there is at least one District of Oregon case,  
6 the *Too Marker Products* case from Judge Papak in 2010, that  
7 says that can't happen. If the testimony happens first and  
8 then the allegedly inconsistent testimony happens later, then  
9 the first testimony can't have been a sham.

10 But, in any event, Nightforce is not moving against  
11 Mr. Otteman's deposition transcript. And he says all the same  
12 things on direct at his deposition that he said in his  
13 declaration, so the point is moot in any event. He  
14 authenticated all the documents and provided all the same  
15 testimony on the record.

16 As to Mr. Byron's declaration, this falls far short  
17 of the sham affidavit doctrine. As detailed in our briefing  
18 on the evidentiary surreply, the sham affidavit doctrine is an  
19 extremely high standard. And in order to prove it, you have  
20 to show enough evidence that the Court can make a specific  
21 factual determination, first, that there is a contradiction  
22 between the testimony and the earlier testimony and that that  
23 contradiction is actually a sham and not merely the result of  
24 clarification or a mistake or a misstatement or simply some  
25 tension between the statements; and, second, that the



1 inconsistency between the deposition testimony and a later  
2 affidavit is clear and unambiguous.

3           There is no ability to make those showings here.  
4 And, in any event, the supplemental Byron declaration that's  
5 at issue is the Byron declaration about whether testing is  
6 necessary. And even if the Court were to strike that as a  
7 sham -- and we don't think the Court should -- there is other  
8 corroborating evidence -- specifically, Mr. Landvatter's  
9 testimony that Mr. Otteman contemporaneously told him that the  
10 scope was tested and worked -- that is sufficient, so the  
11 Court need not get to this issue in any event.

12           I think that concludes the date of invention issue.  
13 So then moving on to the other half of the priority debate,  
14 this is whether the '907 patent claims are entitled to claim  
15 priority back to the provisional patent application.

16           So a bit of background on the way patent applications  
17 are often filed, often an inventor files a provisional  
18 application and then has a year to follow up after that with a  
19 non-provisional application that has more detail; and then it  
20 is the non-provisional application that actually gets  
21 prosecuted into a patent. But if certain requirements are  
22 met, that patent gets priority back to the earlier provisional  
23 filing, which is often put into the record a bit more quickly  
24 to get it on file.

25           I want to take the claims in two different buckets

1 with respect to priority, because the issues are quite  
2 different between them. Dependent Claims 6 and 16 are  
3 significantly narrower than the broader independent claims and  
4 the other dependent claims in a critical aspect, which is  
5 Claims 6 and 16 -- 6 relates back to 1, and 16 relates back to  
6 10. Otherwise, they're essentially the same. And they  
7 say -- the thing that's claimed in Claim 1 or Claim 10 is "in  
8 which the spiral cam track includes a spiral groove and in  
9 which the cam follower includes a pin."

10 There is no question and there is no debate that the  
11 provisional discloses an adjustment mechanism that otherwise  
12 meets the elements of Claim 1, "and in which the spiral cam  
13 track includes a spiral groove and in which the cam follower  
14 includes a pin." And the same is true with respect to  
15 Claim 10.

16 Nightforce's only argument with respect to Claims 6  
17 and 16 has to do with the word "includes." Nightforce takes  
18 the surprising and remarkable position that because the  
19 open-ended claim term "includes" is used in this claim, the  
20 provisional, in order to be entitled to priority, would have  
21 to disclose every possible structure that could be included in  
22 the cam follower, in addition to a pin; otherwise, the claim  
23 is invalid.

24 I say that that's surprising because it is not the  
25 law. Nightforce cites no authority holding that unclaimed

1 elements, such as this, are required to be supported either in  
2 a patent specification or in a provisional application. And  
3 this is important, because it's the same test. It's the same  
4 enablement and written description test that applies to the  
5 provisional and to the specification itself.

6           So if Nightforce's position were adopted, not only  
7 would every provisional application but also every patent  
8 specification case, every time an open-ended term is used, it  
9 would have to call out every possible, imaginable structure  
10 that could be added to the claim structure, because if a later  
11 defendant, under Nightforce's position, could envision some  
12 hypothetical structure that is not disclosed in the  
13 provisional, that would invalidate the patent.

14           That simply isn't the law. There is no way that a  
15 patentee could include every possible structure within its  
16 claims. And the vast majority of patent claims use the  
17 open-ended term "comprises," which -- we've cited authority in  
18 our brief -- is exactly the same as "includes." They both  
19 mean the accused device has to have everything that's in the  
20 claim language, but it can have anything else in addition to  
21 that and still infringe.

22           And the Federal Circuit -- and this is a  
23 non-precedential case, but it has addressed this issue and  
24 said, quote, There is no precedent requiring a patentee to  
25 disclose or enable unclaimed elements. And I think it's

1 telling that this is in a non-prec decision. The Federal  
2 Circuit did not think this was a controversial point of law.

3 The only case that Nightforce points to to dispute  
4 this is the *D Three* case, in which Mr. Davis was counsel. And  
5 Nightforce says, well, there the washer could have been either  
6 above or below. And that's true. The claim language in *D*  
7 *Three* is broad enough, it doesn't say whether the washer is  
8 above or below.

9 But the critical thing is -- the critical difference  
10 is here the bushing is not claimed anywhere in the claim. The  
11 washer in *D Three* was required by the claim. And so the claim  
12 language here does not say anything about a bushing one way or  
13 another, no matter where it is. It simply says you have to  
14 have a pin in your cam follower and you can have anything  
15 else, as long as you have a pin.

16 There is no legal requirement that a patentee  
17 disclose or enable the unclaimed elements of anything else  
18 that falls within that "including." That legal issue is the  
19 end of the analysis as to Claims 6 and 16. And on that basis,  
20 partial summary judgment should be entered that Claims 6 and  
21 16, at least, are entitled to priority back to the provisional  
22 application.

23 There is a hotter dispute as to the other claims.  
24 And the question is: Would a person of ordinary skill in the  
25 art understand, from looking at the provisional disclosure,

1 that Mr. Otteman possessed a rail and fork embodiment?

2 And the two cases here, *Trading Technologies* and  
3 *Hologics*, are discussed in the briefing. In *Trading*  
4 *Technologies*, it describes an example where there is a  
5 single-action user input device. And the example given is a  
6 single mouse click. So it's single-action user input device.  
7 It's not like a keyboard --

8 THE COURT REPORTER: Counsel, I'm going to have to  
9 have you slow down.

10 MR. BRUNETTE: Sorry.

11 A single-action user input device, that's the term in  
12 the claim at issue in *Trading Technologies*. And the  
13 provisional application in *Trading Technologies* calls out a  
14 single mouse click as an example for that single-action user  
15 input device.

16 And the argument is made -- I actually don't remember  
17 if it's a provisional or if it's a specification, but it  
18 doesn't matter; the test is the same. The question is whether  
19 there is written description support for a patent claim that  
20 is broader and claims the entire genus of single-action user  
21 input devices, not just a single mouse click.

22 And the Federal Circuit finds that there is support  
23 because a person of skill in the art would readily understand  
24 from saying, well, you could use a single mouse click because  
25 it's single action, that there are many other things, like a

1 double mouse click, that are also a single user action; and,  
2 therefore, that disclosure of the single mouse click is  
3 sufficient to support the claims, even though the claims are  
4 broader than what was literally disclosed in -- and, as I say,  
5 I forget whether it's the specification or the provisional.

6 In *Hologic*, the Federal Circuit clarified that there  
7 is a lesser showing required for written description in  
8 predictable art fields.

9 So, for example, when the invention is mechanical and  
10 a person of skill in the art can look at a drawing and  
11 understand how the part operates, they have a broader  
12 understanding of what the alternative possibilities are in  
13 those mechanical fields, as compared to, for example, chemical  
14 arts, which is where many of the cases that Nightforce cites  
15 come from, because a chemist cannot necessarily look at a  
16 chemical formula and fully envision how the chemicals are  
17 physically interacting with each other and how small changes  
18 to the chemical formula might or might not change those  
19 interactions. There is some unpredictability in the chemical  
20 arts as compared to the mechanical arts.

21 So turning to the issue on summary judgment, what  
22 evidence is there to answer the question about what a person  
23 of skill in the art would understand? First, there is  
24 testimony from Mr. Byron that a person of skill in the art  
25 would understand that Mr. Otteman possessed the rail and fork

1 embodiment just by looking at the provisional application. On  
2 that testimony alone, Nightforce's motion for summary judgment  
3 should fail. A juror could believe Mr. Byron's testimony; and  
4 therefore find that Mr. Otteman had and understood a rail and  
5 fork embodiment at the time that he came up with the  
6 provisional application.

7 And just to go back for a second, because I dived  
8 into this, and I want to make sure everybody is on the same  
9 page, the reason we care about a rail and fork embodiment is  
10 because the Court's claim construction of cam track was broad  
11 enough to include both a groove or the alternative rail and  
12 fork that's discussed in the specification of the patent.

13 So the patent specification says the cam track -- you  
14 could do the cam track as a groove. All the figures in the  
15 patent show the cam track as a groove. But there's an offhand  
16 statement saying the cam track could also be a rail and the  
17 cam follower could be a fork or a notch of some kind that fits  
18 over that rail, and it would work the same way. So the Court  
19 construed "cam track" broadly enough that the words "cam  
20 track" include both a groove and a rail/fork type embodiment.

21 And now Nightforce is making the argument, well, the  
22 provisional didn't have that offhand sentence about how you  
23 could do it either with a rail or with a groove; and,  
24 therefore, it doesn't support the broader claims because of  
25 the Court's broader claim construction read on a rail and fork

1     embodiment. And so the debate we're having is whether a  
2     person skilled in the art looking at the provisional would  
3     understand that Mr. Otteman possessed the rail and fork  
4     embodiment, knew that you could just invert the groove and do  
5     the same thing.

6             The first point I made is that on Leupold's side of  
7     the ledger there is evidence from Mr. Byron that a person of  
8     skill in the art would make that conclusion, and that should  
9     preclude Nightforce from getting summary judgment on this  
10    issue.

11            The second question is: Can Leupold get summary  
12    judgment on this question? And there we have to look at what  
13    evidence there is on Nightforce's side of the ledger. And on  
14    Nightforce's side of the ledger, Nightforce relies on the  
15    testimony of Mr. Brandenburg. But Mr. Brandenburg is not a  
16    person skilled in the art. His testimony was quite clear that  
17    he has never designed a riflescope. He has never designed  
18    parts for a riflescope. He has no experience with optical  
19    devices of any kind.

20            And so this fits directly with the Federal Circuit's  
21    2016 decision in *Sport Dimension*. I call out *Sundance* because  
22    it's another case and it preceded *Sport Dimension*. In  
23    *Sundance* there was a purported expert witness who purported to  
24    testify about obviousness. Obviousness, like the written  
25    description and enablement doctrines that we're discussing



1 here, requires analysis through the head of a person skilled  
2 in the art, what would such a person understand. And in  
3 *Sundance* the Federal Circuit tells us someone who is not a  
4 person skilled in the art and does not have experience in the  
5 relevant art field cannot tell us what was in the head of a  
6 person who is, only a person who is or is very close.

7 *Sport Dimension* makes that same analysis, but I call  
8 out *Sport Dimension* separately because it is very close to the  
9 facts of this case. And I will put it up.

10 So here is *Sport Dimension*, Federal Circuit, April  
11 2016. And I've called out here the relevant language.  
12 Mr. Bressler is the expert in *Sport Dimension*. The products  
13 at issue in *Sport Dimension* are personal flotation devices; in  
14 other words, lifejackets. And there's a debate about how the  
15 lifejacket works. And the District Court excluded the expert,  
16 saying that even though he was an industrial design consultant  
17 with four decades of industry experience, who had designed all  
18 kinds of products, he had never developed any personal  
19 flotation devices and had, quote, no experience whatsoever in  
20 the field of -- it's PFDs, but the Court changes it to  
21 "personal flotation devices."

22 Exactly the same is true for Mr. Brandenburg.  
23 Mr. Brandenburg has done lots of industrial design. He has  
24 designed lots of products. He has a litany of patents. They  
25 relate, for example, to paper towel dispensers, soap

1 dispensers, medical devices. They do not relate to optical  
2 devices, riflescopes, or shooting sports of any kind.

3 In fact, Mr. Brandenburg admits that he has no  
4 experience with riflescope design, with optical design, or  
5 with any kind of focusing device. And when asked what his  
6 closest analogous experience is, the closest thing he could  
7 think of were endosurgery tools. In other words, he has no  
8 experience in the field and no analogous experience.

9 And if I don't have that on one of the slides, the  
10 citations for that are in the brief. But they are the  
11 Brandenburg transcript, which is Exhibit 38, at pages 11 to 17  
12 and 238 to 242.

13 So on that basis, Mr. Brandenburg can't tell us what  
14 a person of skill in the art would or would not understand  
15 that Mr. Otteman possessed. And since the only evidence of  
16 record is from Mr. Byron, saying that a person of skill in the  
17 art would understand that Mr. Otteman possessed the rail/fork  
18 embodiment, that should be the end of the inquiry and summary  
19 judgment in Leupold's favor should be entered on this issue.  
20 But, at a minimum, Mr. Byron's evidence is in the record, and  
21 Nightforce can't get summary judgment on this issue.

22 That brings us to the third of the Nightforce  
23 defenses on which the parties have cross-motions for summary  
24 judgment. This is a somewhat novel and unusual defense that  
25 Nightforce raises. Nightforce argues that it should get a

1 free pass on all six years of past damages because it contends  
2 that the '907 patent was facially invalid until 2016; and,  
3 therefore, it gets a pass on all infringement before that  
4 time.

5 Nightforce has not made a showing that the '907  
6 patent in fact was facially invalid. And, to the contrary, to  
7 the extent there may have been an error in the '907 patent at  
8 the time it was granted, that error was properly corrected in  
9 2003. And although there was a further certificate of  
10 correction, making a further correction in 2016, that was a  
11 belt-and-suspenders approach, based on an argument Nightforce  
12 raised just before this litigation was filed. It was not  
13 necessary. It was done only out of an abundance of caution.  
14 And the patent was fully valid and certainly at least not  
15 facially invalid prior to that time.

16 So the debate here centers on the difference between  
17 a couple of cases. The two most pertinent of those are the  
18 *Carotek* case, which is relied upon in Leupold's briefing, and  
19 the *Worlds, Inc. v. Blizzard* case that is relied on by  
20 Nightforce.

21 Critically, as we've pointed out in our briefing, the  
22 *Carotek* case lines up with where the '907 patent stood in 2003  
23 after the 2003 certificate of correction was entered. At that  
24 time, the '907 patent had a claim of priority back to its  
25 provisional application, and that claim of priority was made

1 on the face of the '907 patent, right on the front page, where  
2 anybody glancing at the patent could see it, but was not  
3 included in the first sentence of the specification. It's in  
4 the bibliographic data up above that. Exactly the same was  
5 true in *Carotek*, and the *Carotek* Court held that the patent  
6 was valid and therefore not facially invalid.

7           *Worlds*, on the other hand, is different. In *Worlds*  
8 there was no certificate of correction at the time the case  
9 was filed. The *Worlds* patent, like the '907 patent before the  
10 2003 certificate of correction, had no claim of priority in  
11 the patent itself. The claim had been made in the materials  
12 filed with the application, but for whatever reason was not in  
13 the application and was not in the issued patent.

14           Unlike Leupold and unlike the plaintiff in *Carotek*,  
15 the plaintiff in *Worlds* did not go out and get a certificate  
16 of correction. Therefore, it did not put a claim of priority  
17 on the face of patent or in the first sentence of the  
18 specification of the patent or anywhere whatsoever in the  
19 patent until the issue was raised on summary judgment by the  
20 other side.

21           Now, before the litigation became final, there was a  
22 certificate of correction in *Worlds*. And in *Worlds* that  
23 certificate of correction put the claim everywhere. It put it  
24 at the beginning of the patent. It put it at the beginning of  
25 the specification. But the Court said, "Well, it's too late

1 now." So it doesn't look at the certificate of correction  
2 because the certificate of correction was too late.

3 Here the certificate of correction that we have, just  
4 like the certificate of correction in *Carotek*, was obtained  
5 early on. In *Carotek* it was during the litigation. In our  
6 case it was many years before the litigation and before there  
7 was any dispute between Leupold and Nightforce. And like in  
8 *Carotek*, the certificate of correction put the claim of  
9 priority on the face of the patent, but not in the  
10 specification.

11 And so Nightforce's argument centers on a USPTO  
12 regulation that requires the claim of priority to be made in  
13 the first sentence of the specification. The *Carotek* case,  
14 citing to a variety of Federal Circuit authorities, notes that  
15 the point of that requirement is to make it easy for someone  
16 searching the patent to see where the claim of priority is and  
17 how far back a patent claims, and that that purpose is served  
18 as well or probably even better if the claim is placed right  
19 on the face of the patent than if it's buried in the first  
20 line of the specification, which may not be on the first page  
21 and may fall after the figures. Therefore, just as in  
22 *Carotek*, the patent was not invalid on its face.

23 Now, in fallback, in its reply brief, Nightforce  
24 makes a further argument and says, well, that's true, but  
25 Nightforce -- but Leupold confused the Patent Office because

1 they filed their certificate of correction, the 2003 one,  
2 claiming it was the Patent Office's error, not Leupold's  
3 error, in the original application. That's all beside the  
4 point because that's all equally true in *Carotek*.

5 So in *Carotek*, the patentee claimed that it was the  
6 Patent and Trademark Office's fault, the original error. And  
7 the Court ultimately said, You know what? I disagree. I  
8 think it was the patentee that screwed up in *Carotek*, but I  
9 don't care, because it got corrected in time; and the  
10 correction worked just as well as if it had been perfectly  
11 correct and serves the purpose of the regulation. And that's  
12 what the Federal Circuit has told us is important and that's  
13 what it enforces.

14 And a consistent case is the *Prism* case, which is  
15 cited in the briefing. There again a certificate of  
16 correction added a specific priority claim to the title page  
17 of the patent but not to the first sentence of the  
18 specification, and the Court held that that was legally  
19 effective as an exercise of the Patent and Trademark Office's  
20 discretion.

21 *Carotek* also picks up on this issue and notes that  
22 the PTO would never have issued the certificate of correction,  
23 like the 2003 certificate of correction here, unless it  
24 believed that that certificate of correction was effective to  
25 correct the priority date. And since the Patent and Trademark

1 Office, in its discretion, allowed the correction to be made  
2 on the front page of the patent instead of in the first line  
3 of the specification and because the Federal Circuit tells us  
4 that that is sufficient to meet the policy concerns of the  
5 regulation, that's the end of the story. The patent is valid  
6 and certainly not facially invalid as of 2003.

7 A brief fallback position, even if the Court adopted  
8 Nightforce's argument and even if the Court thought that the  
9 patent after 2003 and before 2016 was questionable as to its  
10 validity, there is no question that the 2016 certificate of  
11 correction, adding the same claim of priority to the first  
12 sentence of the specification, makes the '907 patent valid at  
13 all times relevant to this case, because it was obtained  
14 before the case was filed.

15 And the '907 patent was not invalid on its face  
16 before that time because you'd have to look beyond the face of  
17 the '907 patent to find that there was any prior art even  
18 potentially invalidating the '907 patent between the time of  
19 the provisional and the time of the non-provisional filing.  
20 And since that arguable invalidity is not facial invalidity,  
21 there still would be no basis to find that there's no damages  
22 under the '907 patent.

23 As I said, I don't think the Court should reach that.  
24 It's a fallback position. But even if Nightforce were right  
25 on this -- and they are not -- it would not support their

1 argument.

2 The fourth and final issue on which the parties  
3 move -- cross-move for summary judgment is equitable estoppel.  
4 This is an equitable defense that Nightforce asserts.  
5 Critically, there is today a significant difference between  
6 equitable estoppel and laches in the context of a patent claim  
7 for damages.

8 Looking backward, before a couple of years ago there  
9 were very few patent cases that ever got to the issue of  
10 equitable estoppel because there was a strong doctrine of  
11 laches. And almost any time you had equitable estoppel, you'd  
12 have laches and it was easier to prove laches.

13 The Supreme Court has done away with laches as a  
14 defense to a patent infringement claim for damages. It's  
15 simply no longer available because there is a specific statute  
16 of limitations. Therefore, the duty that Leupold was under  
17 that's relevant to this equitable estoppel defense is not the  
18 duty of laches, it is not the duty to bring a lawsuit in a  
19 timely manner. It is the duty to not deceive anyone about  
20 your intent to bring a lawsuit.

21 And Nightforce doesn't prevail just by showing delay  
22 and prejudice. It has to show deception, reliance on that  
23 deception, and resulting prejudice. And so the difference  
24 between being able to rely on delay alone -- in other words,  
25 that Leupold did not sue when it first learned of the



1 infringement -- versus having to prove deception and reliance  
2 on that deception is critical to why Nightforce's defense  
3 fails.

4           So here are the three elements of an equitable  
5 estoppel defense as laid out by the Federal Circuit:  
6 misleading conduct, which can be silence, as long as there's  
7 something more in addition to the silence; reliance by  
8 Nightforce on the misleading conduct; and material prejudice,  
9 which must result from the reliance. It can't just be  
10 prejudice divorced from the reliance.

11           So starting out, what evidence is there about the  
12 alleged deception? Well, Nightforce argues that the deception  
13 occurred as a result of a back-and-forth that the parties had  
14 years ago about infringement. Leupold wrote to Nightforce  
15 saying, "We think you might want to take a license to this  
16 '907 patent. It looks like you might be practicing it. Let's  
17 talk about it."

18           There's a back-and-forth. There's a series of  
19 e-mails back and forth. And those ultimately end with an  
20 e-mail that Leupold's counsel sent to Nightforce's counsel  
21 saying, "Here are the arguments you've made about why you  
22 think our patent is invalid. We don't agree with them. But  
23 let us know what your responses to our counter arguments are."

24           And Leupold gets no response to that. And then  
25 counsel for Leupold, Mr. Ferris, calls and leaves a message

1 for opposing counsel and hears nothing back. And ultimately  
2 Leupold doesn't sue, but things stay in Nightforce's court,  
3 waiting for a response. There is no lawsuit. In 2016 Leupold  
4 picks the issue up again, writes another demand letter, and  
5 ultimately files this lawsuit.

6 And so I would first point to the *ThermoLife* case  
7 from the Southern District of California in 2016, which makes  
8 clear that on summary judgment -- so there's cross-motions for  
9 summary judgment here, and *ThermoLife* is particularly relevant  
10 to Nightforce's motion that it gets summary judgment of  
11 equitable estoppel.

12 And in *ThermoLife* they say that the only way you can  
13 get summary judgment as to the deception prong in the  
14 defendant asserting equitable estoppel's favor is if the only  
15 possible inference from the facts is an inference of  
16 deception. If there is any alternative inference, then the  
17 defendant can't meet its clear and convincing burden -- or,  
18 I'm sorry, cannot meet its burden -- it's not clear and  
19 convincing here -- cannot meet its burden and summary judgment  
20 is not proper.

21 But we think under these facts, given that the ball  
22 was left in Nightforce's court, and Nightforce is the party  
23 that elected never to respond and to draw things out, that  
24 deception is not the only possible inference and, in any  
25 event, that deception by Leupold is not the only possible

1 inference.

2 And I will get to this, but there is also a question  
3 of funny business about what Nightforce was saying at the time  
4 and the potential that Nightforce misled Leupold at the time  
5 of these discussions.

6 The *Hemstreet* case from 1992 is on point with the  
7 facts of this case. There the ball was left in the  
8 defendant's court in the negotiations back and forth, and  
9 there was no specific threat to sue or allegation of  
10 infringement. There was a discussion about licensing. The  
11 same is true here. Leupold's letter was couched in terms of  
12 licensing. And the negotiations went back and forth and ended  
13 in Nightforce's court. So just like *Hemstreet*, we should not  
14 find any deception.

15 Those legal arguments aside, the facts are quite  
16 clear. So during the 30(b)(6) deposition of Klaus Johnson,  
17 who was Nightforce's 30(b)(6) designee with respect to this  
18 defense, he was asked, "Has anyone at Leupold ever done  
19 anything to mislead Nightforce?"

20 And he starts to repeat the question, "Has anyone at  
21 Leupold any" -- and the question is "Yeah, that you're aware  
22 of."

23 "Answer: No. I'm not aware of that at all.

24 "Question" -- getting more specific now: "Any kind  
25 of fraud or deception by Leupold?

1 "No, not that I'm aware of.

2 "What about with respect to its patent rights? Has  
3 Leupold ever misled Nightforce about its patent rights?

4 "Answer: I'm not aware of any -- anything like that.

5 "Question: You don't have any reason to think so?

6 "Answer: No."

7 That is an admission by Nightforce, via its 30(b)(6)  
8 representative, that Nightforce was never misled by Leupold.  
9 Critically, there is nothing in the record from Mr. Johnson  
10 retracting that statement or testimony or taking an  
11 alternative position on behalf of Nightforce or arguing that  
12 he wasn't prepared for his deposition or didn't know about  
13 this or explaining why.

14 Leupold is entitled to rely on Nightforce's  
15 admissions at its 30(b)(6) deposition, by its 30(b)(6)  
16 representatives, as admissions of the company. This alone  
17 should be sufficient to grant summary judgment.

18 However, even more critically and more tellingly, the  
19 record is also clear that Nightforce did not ever rely on any  
20 misleading conduct. So even if the Court were to agree with  
21 Nightforce and conclude that it was somehow misleading of  
22 Leupold to not follow up and send an e-mail, saying, "By the  
23 way, guys, we retain the right to sue you at any time," which  
24 is an action Leupold could have taken, which certainly would  
25 not have been deceptive, Leupold was not required to file a

1 lawsuit at that time. They could have just said, "Hey, we are  
2 reserving our rights. We could sue you any time. You're  
3 taking that risk if you don't respond to us."

4 There is absolutely no evidence that if there was any  
5 deception in failing to do that, in failing to be clear about  
6 the fact that Leupold might sue in the future, that Nightforce  
7 relied in any way on that lack of clarity in going forward and  
8 continuing to make the same infringing products for the next  
9 approximately 10 years.

10 And this is clear from a case called *Gasser Chair*.  
11 It's an older Federal Circuit case from 1995. And there the  
12 case, because it's from before the laches defense went away,  
13 talks mostly about laches, but there is a discussion of  
14 equitable estoppel at the end. It largely tracks the laches  
15 discussion.

16 What the Federal Circuit said is -- well, there's two  
17 parts. One is the Federal Circuit says that the defendant in  
18 *Gasser Chair* engaged in some egregious conduct that tipped the  
19 equities against them. But separate from that, the defendant  
20 never relied on misleading conduct and instead made a business  
21 judgment that it was going to win the litigation if the  
22 litigation was ever filed. So in that case it was clear from  
23 the testimony that the executive of the defendant was not  
24 relying on the fact that he thought the other party had given  
25 up its right to sue. He was relying on the fact that he

1 thought the patent was invalid and he was going to win.

2 And the Federal Circuit tells us that that is not the  
3 basis for an equitable estoppel defense. If a party is making  
4 a business judgment that the patent is invalid and they're  
5 going to win, then they are not relying on any deception;  
6 they're relying on their business judgment. And Ray Dennis  
7 has been extremely clear that he has made exactly such a  
8 business judgment, that he believed that Nightforce did not  
9 infringe any valid claims of the '907 patent; and, therefore,  
10 that under no circumstances, no matter what Leupold had said  
11 and no matter when Leupold had said it, he never, ever would  
12 have changed his products.

13 So here is some of that testimony. So the first test  
14 we have is after this litigation was filed, did Nightforce  
15 stop making these products? Because if it was making the  
16 products based on reliance on the idea that it would never get  
17 sued, that notion certainly was dispelled when the litigation  
18 was filed.

19 Nightforce had not changed its products. And when  
20 Mr. Dennis was asked why it has not changed its products, he  
21 said, "No need to. There's no infringement." In other words,  
22 "We're not infringing any valid claim of the patent."

23 Then he was asked -- so the context for this slide is  
24 he's being shown the demand letter that was sent to Nightforce  
25 shortly before this litigation was filed -- When you got this

1 letter, did you change what you were doing? Did you change  
2 your product to stop infringing on the '907 patent?

3 And he said, "No," on the basis of a legal opinion.  
4 He then stops there, on instruction of counsel, and does not  
5 disclose what that legal opinion was.

6 So you didn't even go down the path of exploring  
7 different design options?

8 "No. No. We're certain that -- we're certain."

9 And then we continue on: What about the '907 patent?

10 Well, he brings up the '907 patent. And the next  
11 slide continues the same line of testimony, from line 4 to  
12 line 5. The questioner points out that the cease and desist  
13 letter at issue is not just about the '907 patent. And  
14 Mr. Dennis says "Okay."

15 The questioner points out two of the other patents  
16 that are involved, and then Mr. Dennis cuts the questioner off  
17 and interjects: "So we've gone through all of these  
18 individually, Nathan, every single one through this pile. And  
19 in every one of those I've explained what you've asked me now,  
20 which is that, no, I didn't consider removing any of them from  
21 the market because I don't believe we infringe, so there's no  
22 reason to remove things from the market if you have that  
23 belief."

24 Then just a few minutes later in the deposition,  
25 Mr. Dennis is asked, "So I take it, then, that Nightforce's

1 decision not to change its products had to do with its view of  
2 the substance of the issues and not with the timing of this  
3 letter. Is that accurate?

4 "No, it's the substance of the issue.

5 "So it wouldn't have mattered when this letter was  
6 received?"

7 And "this letter" that we're referring to is again  
8 the cease and desist letter saying, "We're going to sue you."

9 "No.

10 "The answer would have been the same?

11 "Would have been the same, except more years would  
12 have bypassed us.

13 "Question: Even if it was received in 2007, no  
14 change?

15 "Answer: Correct. I would have been in the same  
16 position."

17 That testimony is fatal to Nightforce's equitable  
18 estoppel argument. Even if Leupold had clearly told  
19 Nightforce in 2007 that they were about to sue them on the  
20 '907 patent or we're going to sue them into 2016, whatever  
21 that hypothetical letter would have said, if he had received a  
22 hypothetical letter in 2007 saying, "We're about to sue you,"  
23 he still would have done nothing.

24 Mr. Dennis was not relying on the fact that Leupold  
25 didn't respond or didn't follow up. He was relying on the



1 fact that he thought he was going to win any litigation  
2 because he believed the patent was invalid. And just like in  
3 *Gasser Chair*, if the defendant is relying on its view of the  
4 merits and a business judgment that it will take the risk that  
5 it gets sued, then it is not relying on any deception and  
6 there is no equitable estoppel.

7 And, indeed, here's paragraph 11 of the declaration  
8 that Mr. Dennis put in on summary judgment in this case, where  
9 he essentially agrees with the point that Leupold is making.  
10 He says, "I reviewed and considered this information at the  
11 time" -- that's the back-and-forth that the parties had  
12 had -- "and made the business decision to risk a lawsuit by  
13 not complying with Leupold's demands."

14 If you take that language and compare it back to the  
15 language in *Gasser Chair*, it is almost identical to what the  
16 Federal Circuit said in *Gasser Chair* is not sufficient to  
17 support an equitable estoppel defense.

18 In addition, there's the question of funny business.  
19 So the *ThermoLife* and *A.C. Auckerman* cases that were discussed  
20 in our briefing point out that because equitable estoppel is  
21 an equitable defense, the Court has to consider all the  
22 equities in weighing whether equity supports barring the  
23 plaintiff's claims.

24 And in this case there is at least a question of  
25 fact -- if the Court had not already disposed of Nightforce's

1 motion for summary judgment that it is entitled to the defense  
2 of equitable estoppel, there is at least a question of fact  
3 about Nightforce's own deceptive conduct that would preclude  
4 giving Nightforce summary judgment of equitable estoppel. And  
5 that has to do with the funny business about the cameras and  
6 the dates.

7           So when the parties had this back-and-forth 10 years  
8 before this lawsuit, Nightforce said, "We've got killer prior  
9 art back before your patent date." And Leupold asked for the  
10 details on that, and that's exactly the e-mail where the  
11 conversation cut off. Nightforce never provided those  
12 details.

13           And, in fact, we now know that the killer prior art  
14 that Nightforce is asserting -- and we'll get to this when we  
15 talk about the Schmidt & Bender products specifically -- is  
16 based upon a supposed teardown that Nightforce allegedly did  
17 of a Schmidt & Bender long-range scope that purportedly  
18 happened in March of 1997, but that we know really can't have  
19 been at that time because the camera that was allegedly  
20 used to take the picture -- or that was used to take the  
21 pictures of whenever the teardown actually happened, was not  
22 on the market in March of 1997 and because the dates of the  
23 photos compared with dates of other photos taken with the same  
24 camera are inconsistent with each other, with the testimony of  
25 the witness who actually took the photos, and with a

1 meticulously maintained desk calendar with the days checked  
2 off that appears in one of the photos of another product with  
3 the exact same date, but could not have been taken on that  
4 date.

5 For all these reasons --

6 THE COURT: I want to interrupt you. I'm going to  
7 take a recess at this juncture.

8 Let's take 15 minutes, and then we'll get back  
9 together.

10 Thank you.

11 (A recess is then taken.)

12 THE COURT: Have a seat. I'm sorry. You're all  
13 standing up.

14 Go ahead. You can proceed.

15 MR. BRUNETTE: Your Honor, I had been talking about  
16 the equitable estoppel issue. I had reached essentially the  
17 end of what I was going to say about that.

18 THE COURT: Okay.

19 MR. BRUNETTE: So I will just dive in with the next  
20 issue.

21 Just a brief reference back to the road map of where  
22 we are, we talked about infringement on which just Leupold is  
23 moving. We've now talked about the four Nightforce defenses  
24 on which the parties have cross-motions, and the next two  
25 things up are two additional Nightforce defenses on which only

1 Leupold is moving.

2 So the first of those are anticipation and  
3 obviousness defenses.

4 THE COURT: I want you to go back a minute. I don't  
5 know that you quite finished up with your equitable estoppel.  
6 You were telling me about the funny business and the camera  
7 that was invented after the date that the photographs were  
8 purportedly taken.

9 How does that fit into the equitable estoppel  
10 argument that is being made here?

11 MR. BRUNETTE: The way those fit together is  
12 Nightforce's statement in the back-and-forth in the 2006  
13 exchange that the -- that Nightforce had killer prior art from  
14 before the patent's filing date, which we understand now to  
15 have been these photos. And Nightforce says, you know, "Well,  
16 we've got killer art back before you."

17 In fact, what they were relying on in making that  
18 statement is prior art that they don't really have. And when  
19 we asked for details about what their argument is and why they  
20 think that it gets before our real provisional filing date,  
21 that's exactly when they cut off the communications.

22 And so it's at least difficult to imagine how  
23 Nightforce can, back at that time, take the position that  
24 "Well, we're going to tell Leupold we've got this great prior  
25 art and then refuse to say anything," and now say, "Oh, we are

1 the ones who were deceived. We didn't understand you. We  
2 thought that you certainly would have sued us or you would  
3 have told us that you were going to sue us," after they were  
4 the ones that said, "We've got this killer prior art," and  
5 then refused to say anything more about it.

6 It seems like having -- having taken those actions to  
7 try to take Leupold off the ball and keep Leupold down about  
8 moving forward, that it would not be equitable for Nightforce  
9 to take advantage of that, to then turn around and argue that  
10 the delay somehow bars the claim later.

11 THE COURT: While it's kind of interesting, I don't  
12 know that it adds much to your equitable estoppel argument  
13 that you already have. But that being the case, you can go  
14 ahead and move on.

15 MR. BRUNETTE: I think the strongest argument is the  
16 reliance point.

17 THE COURT: Thank you.

18 MR. BRUNETTE: So moving on to the Altenheiner  
19 patent, which is a patent on a set of binoculars, here is the  
20 face page of the Altenheiner patent, annotated with the  
21 critical fact, which is simple.

22 What is shown here is binoculars. It is not a  
23 riflescope or a telescopic rifle sight, to use the terminology  
24 of the '907 patent. Nothing in the Altenheiner patent talks  
25 about a riflescope, talks about aiming a rifle, or talks about

1 either a scope or a firearm in any way. It is simply a patent  
2 on binoculars.

3 Now, Nightforce argues, ,notwithstanding this that  
4 the Altenheiner binocular patent somehow anticipates the  
5 claims of the '907 patent. And the reasoning behind that  
6 argument -- so stepping back, the legal test for  
7 anticipation -- and we cite the *Net MoneyIN* case repeatedly in  
8 our briefing for this -- in order to prove anticipation under  
9 Section 102, Nightforce would have to show that a single prior  
10 art reference includes all elements of the claims arranged in  
11 the same way that they are in the claim. So if there is any  
12 difference, any element of the claim that's missing from the  
13 face of the Altenheiner patent, it can't be anticipating.

14 What's missing from the Altenheiner patent, as shown  
15 in the red annotation, is that it's not a telescopic rifle  
16 sight. Nightforce's argument is, yeah, but telescopic rifle  
17 sight isn't really required. They say that's only in the  
18 preamble language of the claims; and, therefore, it's not a  
19 limitation of the claims.

20 If this preamble argument sounds vaguely familiar to  
21 the Court, it's because this is a fight that we had on several  
22 other patent terms at the claim construction stage about  
23 whether preambles or when preambles are limiting, because  
24 sometimes they are and sometimes they're not.

25 And a critical issue that the parties briefed and

1 that the Court decided at that time involved situations where  
2 the preamble provides antecedent basis for terms used in the  
3 body of the claims. And where the body of a claim  
4 uses -- uses the phrase that is also in the preamble and the  
5 preamble is necessary to provide antecedent basis, then the  
6 preamble is limiting. There are a variety of case cites in  
7 our claim construction brief and also in the *Markman* order  
8 adopting that position.

9 And so the question is -- and it's docket 69, at 15  
10 to 16, is where the Court takes this on with respect to a  
11 different patent, but it's the same issue.

12 So let's look at the claims of the '907 patent to  
13 assess whether a telescopic rifle sight, which is right there  
14 in the first four words of Claim 10, is necessary to provide  
15 antecedent basis for anything else in the claim. And the full  
16 preamble here is long, but it is "a telescopic rifle sight  
17 having an adjustable focus setting and an adjustable aiming  
18 offset, the telescopic rifle sight including a tubular  
19 housing," and so on, all the way down to "comprising."

20 What you can see is that in 10(a) and 10(c)(ii), at  
21 the very end, highlighted in blue, is the language, "the  
22 telescopic rifle sight."

23 So "the telescopic rifle sight" can only refer back  
24 up to "a telescopic rifle sight" at the beginning of Claim 10,  
25 which therefore provides antecedent basis for the telescopic

1 rifle sight, and telescopic rifle sight is a limitation of the  
2 claims.

3 In addition, the additional phrase, "the telescopic  
4 rifle sight, including a tubular housing" used in the preamble  
5 provides antecedent basis for the phrase, "the housing," which  
6 is used later in the preamble and in 10(a), 10(b), the flush  
7 language of 10(c), in 10(c)(i), and in 10(c)(ii).

8 And this point is discussed further in the claim  
9 construction briefing but was also decided by the Court: When  
10 just a small part of a longer preamble phrase is referenced  
11 subsequently in the body of the claims, such as "the housing"  
12 here referencing the longer phrase "the telescopic rifle sight  
13 including the tubular housing," the entire phrase from the  
14 preamble, not just the shorthand version, is limiting.

15 Again, that's fully briefed in the claim construction  
16 briefing and I believe is addressed in the *Markman* order as  
17 well.

18 So given the use of "the telescopic rifle sight" and  
19 "the housing" in the claim body, a telescopic rifle sight is  
20 required for a product to infringe or anticipate -- because  
21 the test is the same -- the claims of the '907 patent; and,  
22 therefore, Altenheiner is not anticipating prior art.

23 Nightforce's fallback position is, well, if  
24 Altenheiner isn't anticipating, then it renders the claims  
25 obvious. Now, Nightforce, again, is not moving for summary



1 judgment of obviousness; Leupold is moving. And so the  
2 question is: Is there any evidence that Nightforce could rely  
3 upon to show that -- or to convince a person, a reasonable  
4 juror, that the claim is obvious by clear and convincing  
5 evidence?

6 And there are key questions that Nightforce has to  
7 answer that it cannot answer because it has no evidence. So  
8 there is no evidence in the record why a person of skill in  
9 the art would select Altenheiner to build a rifle sight, no  
10 evidence of why or how a person skilled in the art would  
11 modify Altenheiner to make it into a rifle sight, and no  
12 evidence of any non-hindsight rationale to modify Altenheiner  
13 into a rifle sight.

14 What evidence there is is the Byron testimony  
15 establishing the opposite. There is not much from  
16 Mr. Brandenburg on this point. But if Nightforce were to  
17 point to Mr. Brandenburg's testimony, as discussed earlier,  
18 for the same reasons set out in *Sport Dimension v. Coleman*,  
19 Mr. Brandenburg is not a person of skill in the art in the  
20 field of rifle sights.

21 I do want to point out at this point a question that  
22 we kind of skipped over when we talked about *Sport Dimension*  
23 before and an argument I expect Nightforce may make is: What  
24 is the field of art of the '907 patent and is it really  
25 riflescopes? That's one of their arguments, is it's not

1 really riflescopes.

2 But we just went over that point now on anticipation,  
3 and we can definitively say that the '907 patent requires a  
4 telescopic rifle sight. So the field of the invention is a  
5 telescopic rifle sight, just as the first words of every claim  
6 set out some variation on a telescopic rifle sight.

7 And Mr. Brandenburg has no experience in that field  
8 and therefore cannot tell us what would be in the head of a  
9 person skilled in the art at the time of the invention in  
10 terms of why they might pick out -- or not -- Altenheiner to  
11 build a rifle sight, how or why they would modify Altenheiner  
12 to make it into a rifle sight or why they would be motivated  
13 or have a rationale to do so.

14 And absent that evidence, some basis for that  
15 evidence -- and it can't come from Mr. Brandenburg --  
16 Nightforce can't win on that defense, and summary judgment is  
17 appropriate.

18 The last issue as to the '907 patent is another  
19 Nightforce defense. This is the Schmidt & Bender prior art  
20 scope. This is where we get into the photos. And, again,  
21 it's only Leupold asking for summary judgment on this issue.

22 So Nightforce has -- is arguing that a Schmidt &  
23 Bender scope was itself prior art to the '907 patent. In  
24 order to prevail on that, Nightforce has to show, since  
25 Schmidt & Bender was making those scopes in Germany, outside

1 the United States, that the scope was publicly available in  
2 the U.S. more than one year before the date of the filing of  
3 the '907 patent, which, as we discussed earlier, Leupold  
4 contends the appropriate filing date is the priority date of  
5 the application. So the date that Nightforce has to get the  
6 Schmidt & Bender product in front of is January of 1998.

7 This is an affirmative defense that Nightforce has to  
8 prove by clear and convincing evidence. And instead of clear  
9 and convincing evidence, Nightforce has no evidence from which  
10 a rational trier of fact could find that there was a Schmidt &  
11 Bender scope that had the patented spiral cam system inside  
12 that was available in the United States before the critical  
13 date in January of 1998.

14 There are three general kinds of evidence that  
15 Nightforce tries to rely upon, and none of them help it out to  
16 make this showing. The first is advertisements. The second  
17 is the photos and testimony about a teardown, at some unknown  
18 date, of a Schmidt & Bender device. And the third are two  
19 Schmidt & Bender e-mails, which are inadmissible hearsay.

20 So going through those, first, the advertisements  
21 that I've shown on slide 58, which is up on the screen now, is  
22 an example of one of these advertisements. And they certainly  
23 show -- this one dates from the fall of 1997, and it shows  
24 that Schmidt & Bender is selling some kind of a scope with a  
25 third turret on it, and that's what both the spiral cam scopes

1 and a variety of other prior art scopes that used different  
2 designs to accomplish parallax focus have. There's nothing  
3 about the text or the image of this advertisement -- and it's  
4 exemplary; I think the same is true of all the other  
5 advertisements that are in the record -- that says anything  
6 about what's inside that scope and whether it's a spiral cam  
7 or an orbital pin or some other design. They simply don't  
8 tell us. All that this can prove is that Schmidt & Bender was  
9 selling some kind of side parallax focus scope.

10 They also don't tell us whether the scopes were in  
11 the United States. And the advertisements themselves can't be  
12 a printed publication that would be prior art because they  
13 don't disclose the spiral cam mechanism.

14 Next, Nightforce tries to fill this in by saying,  
15 "Well, we know what was inside those scopes because we tore  
16 one down." All we know there is that at some point Nightforce  
17 got its hands on a Schmidt & Bender long-range scope. We  
18 don't know if it's the same kind of scope that was being sold  
19 in 1997 or not. We don't know when Nightforce got its hands  
20 on it, and we don't know when Nightforce tore it down. We  
21 don't even know how Nightforce got its hands on the scope or  
22 whether such scopes were publicly available in the United  
23 States.

24 In fact, the photos of that teardown show only that  
25 some Schmidt & Bender scope had a spiral cam mechanism. The

1 dates on the photos are demonstrably incorrect. They're  
2 inconsistent with when the camera was available. They're  
3 inconsistent with other dates that Mr. Stockdill, who took the  
4 pictures, identified and the dates of other photos taken with  
5 the same camera. And other photos taken the same --  
6 purportedly taken the same date, dated the same date by the  
7 camera, are inconsistent with a desk calendar shown in one of  
8 the photos with the dates crossed off, even though  
9 Mr. Stockdill testified that he's meticulous about changing  
10 calendars and that if he walks into a conference room and sees  
11 a calendar that's wrong, he changes it; and that if he sees a  
12 VCR flashing, he feels compelled to set the VCR clock.

13 So this guy, who's meticulous about dates, has a  
14 picture of his own desk calendar on his desk, with the dates  
15 crossed off, that cannot be consistent with the month or date  
16 of these photos.

17 And in its opposition brief to summary judgment,  
18 Nightforce says, "Well, that's okay. We don't need to rely on  
19 that metadata. What we'll rely on is the testimony of  
20 Mr. Stockdill to tell us when those photos were taken."

21 But Mr. Stockdill can't provide that testimony. He  
22 said at his deposition that he didn't have any idea where the  
23 scope came from, when the scope was obtained. And he was  
24 quite adamant that the pictures must have been taken in March  
25 of 1997, but he admitted that he was basing that answer only

1 on the metadata associated with the pictures and nothing else.

2 So he doesn't have any independent recollection of  
3 when those photos were taken. His testimony is just repeating  
4 reliance on the metadata that we know is wrong.

5 So all we know is that Schmidt & Bender advertised  
6 some kind of third turret scope. And at some point -- we  
7 don't know when, we don't know if it was before January 1998  
8 or not -- Nightforce tore down some Schmidt & Bender scope  
9 with a third turret and found a spiral cam inside.

10 That's not sufficient to show that any Schmidt &  
11 Bender product was actually on sale in the U.S., that such a  
12 product on sale and publicly available in the U.S. had a  
13 spiral cam, and that all of this occurred before January of  
14 1998. And no rational trier of fact could find that  
15 Nightforce has carried its burden to prove all of those things  
16 by clear and convincing evidence.

17 The last set of evidence that Nightforce relies upon  
18 are two e-mails produced by Leupold from Schmidt & Bender  
19 containing statements that Schmidt & Bender made in 2004 and  
20 2006 about when they first shipped certain scopes. Those  
21 e-mails are hearsay. They contain out-of-court statements by  
22 Hans Bender of Schmidt & Bender and by Sabine Brandt of  
23 Schmidt & Bender, who we know from the context of the e-mails  
24 was Mr. Bender's personal assistant. So really, both of these  
25 statements are coming from the memory of Hans Bender.

1           Hans Bender is talking in 2004 and 2006 about his  
2       recollection of events that happened purportedly in 1997. As  
3       a result, these are not business records -- his recollection  
4       is not a business record of Schmidt & Bender because it is not  
5       a record made by someone contemporaneous with the happening of  
6       the events by someone who had knowledge. There's certainly no  
7       foundation for that.

8           Mr. Bender is not available. There's no indication  
9       that he'll be available to testify to tell us anything about  
10      when this happened or what happened.

11          And even if one were to fully read and accept  
12      everything in these e-mails, notwithstanding the hearsay  
13      doctrine -- and they should not be admissible and should not  
14      be considered -- they still only say that certain scopes were  
15      shipped. They do not prove that those scopes were publicly  
16      available in the U.S.

17          For example, they don't identify whether any scopes  
18      that were shipped were advance shipment to a U.S. distributor,  
19      whether they were for confidential review in advance of the  
20      actual launch of the product. We have no idea when or whether  
21      those scopes were made publicly available in the United  
22      States.

23          And so even if Nightforce could get these e-mails  
24      admitted -- and they're hearsay and Nightforce cannot -- they  
25      still can't prove by clear and convincing evidence that scopes

1 with these features were available in the United States before  
2 the critical date in January 1998.

3 And so that gets me all the way through the issues.  
4 With that, I would reserve for rebuttal after Nightforce's  
5 presentation.

6 THE COURT: Thank you.

7 MR. CASIMIR: Is there a way to turn the light off on  
8 this? It's creating a lot of glare.

9 (There is a brief pause in the proceedings.)

10 MR. CASIMIR: Thank you so much.

11 All right. So we're going to start with the four  
12 issues on the '907 patent that Nightforce affirmatively moved  
13 for, and then we'll come back after that and address the  
14 issues that only Leupold moved on.

15 And we're going to have a little bit of a split  
16 presentation here. So the four topics of, number one, that  
17 Leupold cannot demonstrate an earlier invention and therefore  
18 the claims are invalid, I'll be presenting that topic.

19 Second, we're going to address the issue of whether  
20 the '907 claims are entitled to the provisional priority date;  
21 and, if not, therefore the claims are invalid. And Mr. Davis  
22 will be presenting that.

23 I will then come back and present on the equitable  
24 estoppel issue as well as the late certificate of correction  
25 affecting when damages are available.



1           So on each of these, we're going to be putting this  
2           in the context of a series of timelines. The information on  
3           this slide you don't need to pay too much attention to at this  
4           point. It's just identifying that the story of the '907  
5           patent and these issues can be told in a series of timelines.

6           THE COURT: Do you have copies of your slides?

7           MR. CASIMIR: Oh, yes. Sorry.

8           THE COURT: I actually can see these a little bit  
9           better.

10          MR. CASIMIR: (Handing.)

11          (There is a brief pause in the proceedings.)

12          THE COURT: Thank you.

13          MR. CASIMIR: All right. And so let's start with a  
14          little technical background that's going to help inform all of  
15          these issues. I think it's important to understand, when we  
16          try to identify when an invention happened, what the invention  
17          is, because it's not just a component with a spiral in it.  
18          The claims in the '907 patent claim much more.

19          So we need to understand, what is the invention that  
20          we're looking at to determine when it was invented. And we  
21          also need to understand those claims to identify whether  
22          there's infringement. We need to see the claim elements. And  
23          we didn't get a chance to study those this morning, so we have  
24          just a brief technical background, lining up the structures of  
25          the scopes with some of the claim language so we have some

1 common vocabulary as we go through this.

2 So the first slide here is showing a telescopic rifle  
3 sight, and circled is an adjustment mechanism on the side.  
4 And I'm going to morph this into some of the patent figures  
5 from the '907 patent. So we're overlaying a blow-apart image  
6 of the parallax adjustment knob from the '907 patent. Two  
7 items are colored. The first, in purple, is the actuator  
8 we've been talking about. And that's the piece with the  
9 little nub on it, which is the cam follower, which will  
10 interface with the light green piece.

11 We can't see the groove on the other side of it, but  
12 on the next slide here, we're blowing that up and turning that  
13 around so you can see the drive face with the spiral cam  
14 groove to which that nub on the actuator would interface.

15 And then we're going to look at the claim language  
16 with respect to a figure from the '907 patent that shows a  
17 cross-section, and we're just reproducing the colors here.  
18 When looked at in cross-section, the spiral cam is the light  
19 greenish-blue portion. And you can see it's interfacing with  
20 the purple portion, which is the actuator shown in side view.

21 So now let's look at the claim language. And we're  
22 using Claim 10 as an example. It's one of the two independent  
23 claims asserted against Nightforce and it has the most  
24 elements, so if we look at Claim 10, we will have identified  
25 all of the features that are relevant to any of the claims in

1 the case, in terms of the issues we're discussing here.

2           So we start off with the beginning of Claim 10,  
3 where we have the telescopic rifle sight. It has an  
4 adjustable focus setting. And a key feature I wanted to  
5 highlight here as part of Claim 10 -- and this is true of  
6 Claim 1 as well -- is there is a tubular housing. So we're  
7 not just claiming a adjustment knob here; we're claiming a  
8 adjustment knob in the context of a telescopic rifle sight.  
9 It's part of the larger product. The housing is identified by  
10 the dark purple in this slide.

11           The claim continues on to say that that housing has  
12 an interior and an exterior, first and second ends, and  
13 includes an elongate erector assembly, which has been  
14 identified in the dark purple here. And you'll recall when we  
15 discussed the '305 patent previously, that patent related to  
16 aspects of an erector tube. This is a component that has the  
17 various lens components in it and gets shifted slightly up and  
18 down in response to adjustment knob manipulations. So that is  
19 part of the claim.

20           Another component of Claim 10 is an adjustable aiming  
21 control device, again highlighted in the purple here, that  
22 moves that erector assembly. So, again, these claims are  
23 focusing on a lot of different components of this aiming  
24 device.

25           Next is the movable optical element. And this is a

1 piece that it will be directly interacting with -- or I guess  
2 indirectly interacting with the parallax adjustment knob,  
3 highlighted in purple here. This is within the housing and  
4 moves in a particular manner.

5 And then the last major component in Claim 10 is the  
6 manually adjustable focus control device. This is the  
7 component that has the actuator within it and has the drive  
8 face with the spiral in it. Claim 10 describes that this as  
9 "projecting outwardly from the exterior of the housing." So  
10 it gives us information about the location of it.

11 We then go into the subparts of this control device.  
12 One of them is the cam hub, again, going back to the  
13 greenish-blue color. The second component is -- again, the  
14 specificity on the cam hub, it has this drive face with the  
15 spiral cam track that we've been talking about.

16 And then the second component is the actuator. And  
17 this is "an actuator slide slidably mounted to the housing for  
18 movement along the longitudinal axis." So we get information  
19 about how it's mounted on the housing. And that actuator  
20 includes the cam follower -- there's the "cam follower"  
21 language -- that is "operably engaged in the spiral cam  
22 track." That's shown in the circle here, where you can see  
23 that nub is now sitting into the groove, looking at the side  
24 view of the cam hub. And that connectivity is what gives the  
25 ability to create motion within the device.

1           We also have another piece, which is the actuator,  
2   that "the actuator slide is operatively connected to the  
3   movable optical element." And we see that here with the  
4   little thin piece in the dark purple, where you can see it  
5   connects to the actuator on one end and then links up to the  
6   movable optical element on the other, so that when the  
7   actuator moves side to side, that connector piece will then  
8   also move side to side, pulling the movable optical element  
9   with it.

10           So that ends Claim 10. So we see there's a lot of  
11   pieces here that are claimed. This is the invention of the  
12   '907 patent. It is not just a cam hub with a spiral cam.

13           Claim 1, the other independent claim, is similar.  
14   It does not require as many pieces. It does not require the  
15   erector or the knob adjusting the erector, but it does require  
16   the movable optical element and the connectivity between that  
17   and the focus control knob.

18           Let me stop there and see if there are any questions  
19   on the technical description before we go into the subject  
20   matter of the four issues.

21           THE COURT: No. I'm good. Thank you.

22           MR. CASIMIR: Okay. So issue No. 1, that Leupold  
23   cannot demonstrate an earlier invention -- and, of course,  
24   from the introductory presentation, what we're talking about  
25   here is an invention earlier than the German publication.

1           It's important to note here that when prior art is  
2 identified that predates the date of filing of a patent  
3 application -- and in this case, this prior art predates both  
4 the patent filing date as well as the provisional filing  
5 date -- the burden then shifts to the other party, to the  
6 patent holder, to demonstrate that they can prove an earlier  
7 invention. It is Leupold's burden of production to  
8 demonstrate that here. They need to provide evidence that  
9 demonstrates that point. And they do not have probative  
10 evidence on that point, as we'll see.

11           Under the law, there are different processes one can  
12 use to show earlier invention. In this case Leupold is only  
13 relying on one of those processes, which is that they are  
14 required to show an earlier conception date -- in other words,  
15 the fully formed idea of the invention was in the minds of the  
16 inventors prior to the prior art date -- and reduction to  
17 practice, that a prototype was made and shown to work for its  
18 intended purpose. And Leupold cannot meet its burden on these  
19 grounds.

20           A lot of the presentation earlier today was related  
21 to the conception component. For the purposes of this motion,  
22 we're not disputing conception. There are significant  
23 problems with their conception evidence, but we don't need to  
24 get into those here. The reduction to practice component  
25 alone is sufficient to grant this motion, and that's been our

1 focus in our motion.

2 I think the reason we've heard a lot about the  
3 conception is they have some evidence of conception. Again,  
4 we're not getting into why that evidence is faulty, but they  
5 lack evidence of reduction to practice. By merging those two  
6 concepts, I believe they've tried to make it appear that  
7 there's more than there actually is.

8 All right. So let's look at our first timeline here.  
9 So a key date is the filing date of the patent itself, not the  
10 provisional, but the final version that is the granted patent.  
11 This was January 31, the year 2000.

12 Leupold is claiming that it deserves a priority claim  
13 for its claims asserted in this case to a provisional patent  
14 application, which was filed January 29, 1999. We'll get into  
15 that dispute as the second point. But that marks our two key  
16 dates for identifying prior art.

17 Prior art that's prior to either of those is relevant  
18 to this case. Most relevantly, however, is the prior art  
19 we've been describing as the German publication. This is the  
20 Schmidt & Bender patent describing their own spiral cam design  
21 that was published on March 26, 1998, predating both of the  
22 filing dates. This was based on a German patent filing  
23 initially made on November 22nd, '97. It took several months  
24 for that to publish. It's the publication date which acts as  
25 prior art under U.S. law, so the March 26, 1998 date.

1           What makes this issue simpler than it might have  
2 otherwise been is the parties acknowledge -- there's no  
3 dispute on this -- that if the German publication is prior  
4 art, either because the claims are not entitled to an earlier  
5 priority date or because Leupold cannot show earlier  
6 invention, the claims are invalid. There's no dispute in this  
7 case that that German publication teaches all of the elements  
8 of the asserted claims.

9           And a simple picture here helps illustrate that  
10 point. You can see that the earlier Schmidt & Bender  
11 invention looks nearly identical in terms of its structure to  
12 what was filed later by Leupold.

13           And I'll wait for you to look away, okay, before I  
14 shift to the next slide.

15           Thank you.

16           So as we'll see, focusing on reduction to practice,  
17 there is no probative evidence of reduction to practice. A  
18 number of items of evidence have been highlighted. We'll deal  
19 with each of them individually to demonstrate that they do not  
20 link to the '907 patent, or if it's testimony, that that  
21 testimony was recanted.

22           What does the evidence actually show, the evidence we  
23 have in hand about when reduction to practice occurred? Let's  
24 go back to our timeline.

25           And so the first item I'm highlighting here I've



1 added to our old timeline, is in the middle there is a  
2 November 24, 1998 date. We know from document production that  
3 Leupold was aware of the Schmidt & Bender patent before it  
4 filed its own patent. We know that because they received an  
5 English translation of the original German document on  
6 November 24, 1998. So they had the Schmidt & Bender patent in  
7 hand, with all of the details in it, before they filed their  
8 own patent application.

9 In December 1998 and after that period, going into  
10 1999, we get the actual documents indicating work on reduction  
11 to practice. So we see CAD drawings, engineering drawings  
12 that appear to have been the type that would have been sent  
13 off to third-party manufacturers to make parts. We see the  
14 actual work being done on a prototype starting as early as  
15 December '98 and afterwards, much of the work in 1999. All of  
16 this is after the date of the German publication.

17 So the real evidence, the concrete evidence, where  
18 you can see the pictures and line them up to the product,  
19 comes afterwards. The documentary evidence to corroborate  
20 reduction to practice only appears after the German  
21 publication.

22 All right. So we need to understand the legal  
23 standard here. To demonstrate reduction to practice, Leupold  
24 must demonstrate two things: first, that a prototype was made  
25 prior to the German publication; and, second, that the

1 prototype worked for its intended purpose.

2           What evidence is required to meet that burden?  
3 Inventor testimony can be part of it, but the law says  
4 inventor testimony alone is insufficient. There must be  
5 corroboration. Why is that? Inventor testimony is  
6 oftentimes, in these patent cases, old, stale, sometimes  
7 biased. The law is crystal clear we cannot rely on that  
8 testimony alone. And what we run into in this case is both  
9 problematic initial testimony and a complete absence of  
10 relevant probative corroboration. And the corroboration must  
11 show both that a prototype was made and that it worked for its  
12 intended purpose.

13           So let's start with the "worked for its intended  
14 purpose" because, in a sense, it makes the case very  
15 straightforward and it makes it easy to find, on summary  
16 judgment, invalidity in favor of Nightforce's motion. The  
17 reason for this is Leupold has provided no corroborating  
18 evidence that a prototype worked for its intended purpose  
19 prior to the German publication. There is no evidence. That  
20 is issue dispositive on its own.

21           Recognizing this issue, in the middle of summary  
22 judgment briefing Leupold came forward with a late-filed  
23 declaration from its expert, for the first time taking a  
24 position and arguing that this invention is so simple no  
25 testing was required to demonstrate that it worked for its

1 intended purpose. They needed to say that because the case  
2 was over otherwise.

3 We'll get into that specific testimony. We'll get  
4 into the law on that issue, because the late-filed Byron  
5 declaration does not satisfy the law on the issue, and the  
6 cursory language used on it does not provide a factual basis  
7 to support that point, regardless of what the law is.

8 Keep in mind, now that we've looked at what the  
9 invention was in those initial slides, the invention is not  
10 just that cam surface. The invention is this device that has  
11 all of these components working together, moving parts,  
12 sensitive parts, sensitive optical parts.

13 All right. So let's walk through this late Byron  
14 declaration, keeping in mind that before this was filed, we  
15 were done. The '907 was invalid. One of the prongs of  
16 corroborating evidence that was necessary was not in the case.  
17 And rather than providing that evidence, we're now hearing  
18 that they don't need to because this is one of those special  
19 cases where the invention is so simple, no testing is  
20 required.

21 Problem No. 1 with the Byron declaration is it says  
22 the exact opposite of every position he had taken in the case  
23 before that moment. And we see a quote here from Mr. Byron,  
24 from his expert reports, that "Solving a design problem in the  
25 field of riflescope adjustments has always involved severe

1 testing, such as impact tests, recoil tests, submersion tests,  
2 and pressure tests," the exact opposite of this late-filed  
3 statement he's making.

4 Other statements from Mr. Byron: "A riflescope is a  
5 precision optical instrument which is subjected to forces that  
6 bend and distort it, yet when it returns to rest, it must  
7 still return all of its component to the same zero point  
8 without damage. The design and mechanisms in the patents  
9 asserted by Leupold in this case incorporate these  
10 requirements."

11 That leaves very little doubt about whether testing  
12 is required or not. And we know that. The claim we looked at  
13 has sensitive optical components connected by fragile pieces  
14 to each other, creating movement, that all have to be handled  
15 in very sensitive ways so that when it's mounted on a  
16 riflescope -- or mounted on a rifle and the rifle is fired,  
17 all of these points that Mr. Byron historically had made are  
18 designed into that product so that the product does not fail.

19 Mr. Byron made similar assertions in four other  
20 paragraphs. The citation is here. This is also cited in our  
21 brief.

22 In addition to being contrary to his own prior  
23 testimony, it's contrary to everything we've seen in this case  
24 so far. So on June 18th, Inventor Otteman signed a  
25 declaration that was written by Leupold, testifying that a

1 working prototype was made and tested. So apparently he felt  
2 testing was needed. He did testing.

3 On June 29th, during his deposition, Mr. Otteman, the  
4 inventor of the '907, testified that testing is important. So  
5 the inventor disagrees with the Byron's new position. He  
6 agrees with his original one, disagrees with his new one.  
7 Otteman didn't remember when he actually did the testing and  
8 didn't remember what testing he did, but he did note that it  
9 was important.

10 On September 10th Byron submitted a rebuttal report  
11 on the issue of validity, asserting that the evidence in the  
12 record showed that the inventor had demonstrated that  
13 "it" -- the invention of the '907 patent -- "worked for its  
14 intended purpose by making a working prototype," and then went  
15 on to discuss the importance of testing. Everything we saw  
16 before summary judgment, testing was mandated.

17 September 25th Mr. Byron is deposed and extensively  
18 questioned on the issue related to the '907 patent about  
19 evidence for whether -- whether there was any evidence that  
20 testing was done that it worked for its intended purpose. At  
21 that point Mr. Byron never raised this issue that testing was  
22 not necessary. Again, not an issue until they needed it to be  
23 to try to salvage what was a legal position that loses then  
24 validity on summary judgment on the '907 patent.

25 Importantly, October 5 Leupold moved for validity on

1 the '907 patent. So they have a motion saying that the '907  
2 is valid around the German publication, arguing that they had  
3 earlier invention. So in this case they bear the burden to  
4 show reduction to practice. They relied on Byron's rebuttal  
5 report and all of his historic testimony, which says testing  
6 is needed. They never raised the issue that testing is not  
7 necessary.

8           They carried the burden. They had to show that  
9 reduction to practice occurred. They had to show that a  
10 prototype was made. They had to show that that prototype  
11 worked for its intended purpose. And if they believed no  
12 testing was required, they needed to make that argument.

13           Silence. It's not in there. Why? Because that has  
14 never been their position in the case until it needed to be  
15 after Nightforce submitted its summary judgment motion, also  
16 on October 5, calling out this absence of evidence that's  
17 fatal to the position of validity.

18           And then 21 days later, along comes the late Byron  
19 declaration with his contradictory testimony, changing his  
20 position, for the first time saying the invention is so  
21 simple, no testing is required.

22           So let's talk about that declaration. First,  
23 Nightforce takes the position that it should be dismissed as  
24 coming in too late. This is an issue of validity that Leupold  
25 bore the burden on in their initial summary judgment motion.

1 This is an issue that's been in this case since its beginning.

2 Why are we seeing it after substantial summary  
3 judgment briefing is in place? We know why. They had to do  
4 something. Otherwise, they were going to lose this case. It  
5 is improper.

6 In their briefing, they argued that Nightforce needs  
7 to show prejudice to be able to argue that the document is too  
8 late and to have the Court dismiss it as being too late. The  
9 prejudice here is clear: Absent this late declaration, the  
10 patent is invalid.

11 Further, the declaration should be dismissed as  
12 providing contradictory testimony. One cannot create a fact  
13 issue to try to survive summary judgment by submitting an  
14 affidavit contradicting the prior position. We can't create  
15 disputed facts by disputing things ourselves, our own  
16 testimony.

17 We highlighted the sham affidavit rule in our  
18 briefing on this. Leupold responded with a surreply on that  
19 point, citing several cases; and we heard a little bit about  
20 that today. Their cases are unavailing.

21 They cite the *Kennedy v. Allied Mutual Insurance* case  
22 to suggest that it's not an absolute rule that if some  
23 testimony is contradictory, you throw out the second  
24 declaration. However, that case tells us that it is the  
25 general rule and that there needs to be circumstances in which

1 the second affidavit can stand; and those circumstances are  
2 that the second affidavit needs to explain the difference.

3 That case, giving examples, says perhaps in the  
4 original testimony, the original declarant or deponent was  
5 confused, and they can clarify that in their second affidavit.

6 In this case Leupold makes an attorney argument that  
7 they believe the testimony is not inconsistent because  
8 earlier, they are alleging -- purely by attorney argument --  
9 that the earlier testimony was talking about prototyping for  
10 commercialization, and this new testimony is talking about  
11 prototyping for the original engineering and design. We'll  
12 see in a second that that's nonsense.

13 But what's lacking to defeat the sham evidence rule  
14 is Byron telling us that, saying, "Here I'm saying something  
15 that appears to be exactly the opposite, and here's why my  
16 earlier inconsistent testimony differs." That's missing.

17 The second case they cite, which was cited in their  
18 slides, which was the *Van Asdale* case, says that. They even  
19 clarified that in their surreply, describing that that case  
20 talks about circumstances where the second affidavit clarifies  
21 the first one. Here we don't have any clarification. We just  
22 have an opposite statement.

23 The sham affidavit rule applies. And even if it  
24 didn't, you still cannot create a disputed fact by saying one  
25 thing and then saying the opposite later where they have the



1     burden of proof. They have to prove earlier invention.

2             Lastly, and regardless of if we accept it as not  
3     being late, if we accept it as not violating the sham  
4     affidavit rule, the substance of the Byron declaration itself  
5     does not get them out of the invalidity position.

6             First of all -- and I encourage you to read it in  
7     detail; it's very brief -- it provides an unsupported  
8     assertion that the invention, appearing to focus on the cam  
9     component and not the entire product, is so simple that no  
10    testing is required. That simple statement contrasts the  
11    extensively developed record of all the prior testimony  
12    explaining why testing is required, giving specific reasons  
13    and talking about what that testing is.

14            Furthermore, the new Byron late declaration does not  
15    address the elements of the claims. The invention is the  
16    invention of the claims. Mr. Byron does not say that that  
17    whole thing is simple, and we know it's not. He didn't talk  
18    about the optical components and how they get adjusted when  
19    all of these bits and pieces moved.

20            And, as we'll see, the law says that there are very  
21    rare circumstances where an invention is so simple that no  
22    testing is needed; and this is clearly not one of them.  
23    Mr. Byron did not address any of that law or any of the facts  
24    relevant to assessing that law. So his late declaration, in  
25    addition to being too late, in addition to being

1 contradictory, lacks the substance needed for them to salvage  
2 this issue.

3 Let's look at the law. So this is one of the cases  
4 that Leupold cited in its briefing, the *Scott v. Finney* case.  
5 And for simplicity, we've created the category language here.  
6 This is not language that's in the case, but it's going to  
7 make it easier to understand the different levels of testing  
8 that might be required.

9 The *Scott v. Finney* case, addressing the issue of  
10 whether testing is needed to demonstrate reduction to  
11 practice, describes several different categories of when it is  
12 required and how much is required. And it says we use a  
13 "common sense" approach.

14 So depending on the nature of the invention, it may  
15 need to be tested "under actual conditions of use" -- we're  
16 going to call that Category 4 -- or it "may be tested under  
17 'bench' or laboratory conditions which fully duplicate each  
18 and every condition of actual use," so not actual use, but  
19 simulations of it -- Category 3 -- or in some cases it "may be  
20 tested under laboratory conditions which do not duplicate all  
21 of the conditions of actual use" -- Category 2 -- each of  
22 these cases requiring testing.

23 Lastly, "In instances where the invention is  
24 sufficiently simple, mere construction or synthesis of the  
25 subject matter may be sufficient to show that it will operate

1     satisfactorily" is Category 1. No testing may be required if  
2     the invention is so simple.

3             All right. So let's look at the case law of where  
4     things fall in the Categories 1 through 4.

5             So Category 1, where no testing is required, it's  
6     very difficult to find these cases. There's not many of them.  
7     The *Slip Track* case is cited here. That's one of the cases  
8     cited by Leupold. Another one in the citation chain of the  
9     various cases is this *In re Asahi*.

10            So the simple inventions, where the Courts have held  
11     no testing is needed, from everything we've seen, all have no  
12     moving parts. The *Slip Track* case was a wall bracket with  
13     holes in it. The *In re Asahi* case was a tube within a tube to  
14     prevent leaks; in other words, if the first tube leaks, you  
15     have a second tube around it as a backup. Really simple, no  
16     moving parts.

17            Category 2, where some testing is required, examples  
18     include a rail car coupled mount and a penile pump implant.

19            Category 3, more testing is required, not field  
20     testing, but simulated field testing, a situation where we  
21     have a perforating pipe string in a well.

22            And then Category 4, where the most severe real world  
23     testing is required, two cases: *Payne v. Hurley*, related to  
24     spark plugs which undergo stress in real life, temperature  
25     changes, pressure changes, and we need to test the prototype

1 to see if it's going to work; and the *Elmore v. Schmitt* case  
2 related to an oscilloscope which gets subjected to vibrations  
3 and temperature changes in the context where it's going to be  
4 used.

5 So where does the claim subject matter of the '907  
6 patent fall? It is clearly not Category 1.

7 So in the Byron late declaration, he says that  
8 testing is not required because the "mechanical operation of  
9 the device is straightforward and predictable," without going  
10 into any discussion of the legal basis, the legal standard, or  
11 what facts he's looking at or even what parts of the  
12 technology he's looking at to make that conclusion. He can't  
13 make that conclusion with the riflescope, the optical device  
14 claimed in the '907 patent.

15 No evidence was provided as to why the device is  
16 allegedly so straightforward. And Mr. Byron failed to address  
17 all the claim elements, so, again, lacking.

18 So let's compare the designs from the *Slip Track* case  
19 where no testing was required. This was a simple bracket with  
20 elongated screw holes in it. That's the invention. The  
21 reason it helps withstand earthquakes is there is a little bit  
22 of give where the screw holes are. They're a little longer,  
23 so it can shift a little bit, an extremely simple invention.

24 Compare that to the '907. We have multiple moving  
25 parts. We have knobs that need to be rotated. We have an

1 actuator that slides linearly in response to the cam rotation.  
2 We have a linker arm that's moved by the actuator. We have  
3 precision optics that move with the actuator slide.

4 For Claim 10, we also have the erector with the  
5 sensitive lens units that have to be aligned to all of these  
6 other components. Byron already told us -- and he was correct  
7 in his earlier statements -- this type of invention requires  
8 testing.

9 Leupold's prior position, at every point up until  
10 they needed to say otherwise, was that this wasn't even just  
11 Category 2 or 3 -- if it's any of those categories, they're  
12 out. But their position was it was Category 4. Again, Byron  
13 says, "Solving a design problem in the field of riflescope  
14 adjustments has always involved severe testing."

15 And then we go into the details of those tests, which  
16 include recoil tests, pressure tests. And you're seeing  
17 trigger language here from the Category 4 cases.

18 Byron also says "riflescopes must also be capable of  
19 operation under severe conditions" -- more trigger words from  
20 the Category 4 cases -- "of high and low temperatures."

21 Byron is not unequivocal at all about this before  
22 summary judgment: "As all who are versed in the firearms arts  
23 understand, there are unique design challenges, including but  
24 not limited to: impulse loading, shock, potentially  
25 destructive oscillations, shape changes, weathering, and the

1     like" -- again, all of the Category 4 trigger words.

2             Leupold in their briefing -- again, not from the  
3     mouth of Mr. Byron, but in their attorney argument --  
4     suggested that Mr. Byron was talking about commercial design  
5     and not original design. That's just not the case. You can  
6     see in these quotes, he's talking about design challenges.

7             And we have much more from him, making it clear he's  
8     talking about the original design, not commercialization.  
9     This is the language from his deposition. I asked, "To  
10    determine whether" -- and in this case we were talking about  
11    the Windauer knob. They make the same argument in the  
12    Windauer case. All the same argument applies to the '907 as  
13    well.

14            It says, "To determine whether it's going to be  
15    useful on a riflescope, is durability testing, environmental  
16    testing, wear testing required?"

17            And then Mr. Byron asked for clarification: "Are we  
18    talking about the design or the product?"

19            So he wants to know if we're talking about the  
20    commercialization or the early work, which he's referring to  
21    as "design."

22            I clarified, "The prototype," so we have no question.

23            He goes on: "The prototype. As a rule, prototypes  
24    are just that. They're made for either form, form and fit, or  
25    form, fit, and function. It really depends on which stage of

1     prototyping you are at in order to say whether or not it could  
2     be used on a firearm."

3             I asked, "When we're assessing a prototype for form,  
4     fit, and function, particularly the function aspect of it, is  
5     that testing required?"

6             We had an objection as to whether my hypothetical was  
7     complete.

8             "Answer: If you are getting to the point where you  
9     are at form, fit, and function, that would be the stage where  
10    you would begin testing."

11            So Byron had no problem agreeing that during the  
12    design stage, testing is required of the type of Category 4.

13            This issue also came up in Mr. Byron's testimony when  
14    he was talking about the Altenheiner binocular prior art and  
15    trying to distinguish the complexities of riflescope design  
16    compared to binocular design to argue that they are different  
17    from each other.

18            So Byron says, "Binoculars, unlike riflescopes, are  
19    not attached to firearms; and, as such, binocular optical  
20    elements and mechanical adjustment do not have to be and are  
21    not designed to withstand repeated devastating forces of  
22    recoil, including from high-caliber weapons."

23            The obvious corollary to that is riflescopes do  
24    require such testing.

25            Byron's second statement: "Because binoculars are

1 not designed to be mounted on a weapon and to withstand  
2 recoil, they are also not engineered to manage backlash during  
3 recoil."

4 The corollary is riflescopes are engineered, designed  
5 to withstand recoil, again, Category 4.

6 Byron emphasized -- and, again, everything Leupold  
7 said before summary judgment required Category 4 testing.  
8 Byron was extreme in his position on this, saying that "If  
9 there is any play or slop between the parts of the focus  
10 control mechanism" -- so here we're talking about the spiral  
11 cam and the actuator and the way it connects to the optical  
12 components -- "when the firearm is fired and recoil forces  
13 impact the scope, the setting, such as the focus setting" --  
14 the subject matter of the '907 patent -- "may move as a result  
15 of recoil, potentially resulting in a miss with the next  
16 shot."

17 "Slight errors in adjustment, potential subtle  
18 reticle movement relative to the target with head movement in  
19 a riflescope parallax focus adjustment are critical."

20 "The stakes for potential slight adjustment errors in  
21 aiming a lethal projectile with a riflescope can mean life and  
22 death."

23 I think that's obvious with riflescopes. Testing is  
24 required.

25 This next slide just lines up the language from Byron



1 to the language from the Category 4 *Payne* and *Elmore* cases,  
2 where when there are issues of objects losing their shape,  
3 being exposed to high temperatures and pressures, to  
4 temperature changes, to vibrations, like with oscilloscopes  
5 and spark plugs, Category 4 testing is required. These are  
6 all of the trigger words that Byron used before he changed his  
7 mind.

8 Leupold has not provided any evidence of testing, let  
9 alone Category 4, 3, or 2. It doesn't matter which categories  
10 it's in. So there's no to practice demonstrated. On that  
11 basis alone, summary judgment is appropriate.

12 Earlier today there was a suggestion that  
13 Mr. Landvatter, who is the person at Ideality who made two  
14 parts for Inventor Otteman, testified that there was success  
15 with the prototype. We'll get to that when we get to  
16 Mr. Landvatter's testimony.

17 The citations provided by Leupold, he said no such  
18 thing. He says he actually never saw a prototype. The only  
19 communication he had is Mr. Otteman told him that the parts  
20 that were sent to him worked. We have no date of when that  
21 occurred. And there's good reasons to believe that happened  
22 in 1999, as we'll see when we get to Mr. Landvatter's  
23 testimony. That's the only other thing they've raised to  
24 suggest corroboration of "worked for its intended purpose."  
25 That was not for the claimed invention, and there's no date on

1 that.

2 So no reduction to practice, no prior invention  
3 demonstrated. Thus, the German publication anticipates, and  
4 the asserted claims are invalid.

5 THE COURT: Let me interrupt you for a second. And  
6 I just -- it may be in the materials and I'm just not  
7 remembering.

8 You said that there was no information given to you  
9 that testing occurred. In the discovery process, was there  
10 any information that testing ever occurred?

11 MR. CASIMIR: There was indication in 1999,  
12 indirectly, that testing occurred, in the sense that what we  
13 saw was CAD drawings of what looked to be a completely  
14 engineered set of components that one could use to assemble a  
15 case. But we actually don't have any idea of the actual  
16 testing that was conducted.

17 Mr. Otteman testified during his deposition, however,  
18 that it was routine practice for these types of products --  
19 riflescopes -- to be tested as part of the design and  
20 prototyping stage.

21 THE COURT: Thank you.

22 MR. CASIMIR: All right. So any other questions on  
23 the aspect of "worked for its intended purpose"? If not,  
24 we're going to move to whether there's evidence that a  
25 prototype was even made prior to the German publication.

1 THE COURT: I don't have any questions. Thank you.

2 MR. CASIMIR: Okay. So we think that the lack of  
3 evidence that it worked for its intended purpose is  
4 dispositive. But even if there was such evidence, there is no  
5 evidence that a prototype was made prior to the German  
6 publication, no probative evidence. And, again, this issue on  
7 its own is dispositive. So if Nightforce prevails on this  
8 single issue, the '907 patent claims are invalid and the '907  
9 patent goes away.

10 With the issue of "worked for its intended purpose,"  
11 Leupold provided nothing. With the issue of "was a prototype  
12 made," they provided a few things, three things in particular.  
13 But as we'll see, this is not probative evidence that can  
14 allow Leupold to meet its burden of proof.

15 So the first was declaration testimony by the  
16 inventor, Otteman. As we know under the law, without some  
17 level of corroboration, that is insufficient on its own. And  
18 as we'll see, he recanted that testimony.

19 Second, they provided financial records. As we'll  
20 see, there is no basis at all to say that those financial  
21 records have anything to do with the '907 patent. They have  
22 no probative value.

23 Lastly, they provided testimony from the part maker,  
24 Landvatter, which we saw earlier today. That was relied on  
25 for corroboration. What we saw was testimony he gave in his

1 opening testimony. Upon cross-examination he recanted the  
2 points we saw earlier today. He testified that he never saw a  
3 prototype. And, in fact, he testified that the parts that he  
4 made for Leupold -- and he had memory of this -- were not the  
5 parts that matched the designs that Mr. Otteman sent to him.  
6 They, in fact, matched the design from 1999, not the early  
7 design from Mr. Otteman, if we can put an early date on it.

8 So nothing probative from Mr. Landvatter. If there  
9 is anything probative, it suggested that any work he did  
10 related to the reduction to practice occurred after the German  
11 publication. But let's take each of those three things in  
12 turn, starting with Otteman's testimony.

13 So Mr. Otteman submitted a declaration in this  
14 case -- it's in the record -- saying that he oversaw assembly  
15 of a prototype in late 1995 to early 1996. On  
16 cross-examination in his deposition, he acknowledged that he  
17 didn't write the declaration and that he did not gather any of  
18 the information or evidence used in that declaration. Those  
19 were prepared by Leupold and handed to him. He reviewed them,  
20 presumably believing that accurate information was being  
21 provided to him, and signed the declaration. When we walked  
22 through the details with him on cross-examination, he recanted  
23 on the dates.

24 So, importantly, on cross-examination he testified  
25 that he had no independent recollection of the timing of

1 reduction to practice other than financial documents that were  
2 provided to him that had 1995 and 1996 dates on them. We'll  
3 get to those documents in a second. Those documents have  
4 nothing to do with the '907 patent.

5 So he was handed documents with 1995, '96 dates on  
6 them. He believed they might have been related to the '907  
7 patent and signed his declaration based on that. Again, on  
8 cross-examination, after reviewing those, he acknowledged that  
9 he cannot say that those were related to the '907 patent, and  
10 he had no independent memory of when he did reduction to  
11 practice.

12 And, in fact, when I asked him for his independent  
13 memory, his independent memory was that his conception of the  
14 invention occurred near the filing of the patent. We know  
15 that was 1999. So his independent recollection was it was  
16 later. The only basis for 1995 to '96 for reduction to  
17 practice was these financial documents. He did not know which  
18 project those financial documents were from.

19 And just a reminder, his initial testimony here is  
20 insufficient without corroboration. And this is the very  
21 reason why corroboration is important, because we have someone  
22 who didn't remember anything from this time period, who had  
23 memories created by documents unrelated to the '907 patent  
24 that were the basis for his declaration.

25 Here's a physical copy of one of the pages from the

1 financial documents. What you'll see here is Ideality, Inc.,  
2 the company who made two parts for Mr. Otteman, and some dates  
3 from 1995 and 1996. Lacking from this is any indication that  
4 these relate to the '907 patent at all. And no witness has  
5 put these in relation to the '907 patent, as we'll see.

6 So this is a check registry. It's a check registry  
7 with five dated entries from 1995 to '96 for unknown work  
8 conducted by Ideality. There are no project identifiers.

9 We learned from other documents in this case and from  
10 Mr. Otteman's and Mr. Landvatter's testimonies that Leupold  
11 was working with Ideality on other projects at the time. We  
12 don't have any evidence that they were working on the '907  
13 project at the time, but they were working on other projects  
14 at the time, so it's no surprise that there are invoices from  
15 that time period to Ideality.

16 Mr. Otteman testified that he cannot say that those  
17 invoices, which he relied on for the date, relate to the '907  
18 project.

19 Mr. Landvatter was also asked about this, and he said  
20 he cannot say that these are for the '907 patent on  
21 cross-exam. And, in fact, because he only made two parts for  
22 this project, as he recalled, the fact that there were five  
23 invoices led him to believe that those invoices are probably  
24 not for the '907 patent. He couldn't say one way or the  
25 other, but he concluded they were probably not. Why would

1     there be five invoices for two parts?

2             So these financial documents have no probative value.  
3     This was one of the two pieces of corroboration used to  
4     identify -- to corroborate reduction to practice, that a  
5     prototype was made. One of them is out the door.

6             Let's look at the second one, which is Landvatter's  
7     testimony. We saw again earlier today some testimony  
8     suggesting that he thought work might have happened in 1995,  
9     '96. Why was that? Well, it turns out that Leupold's  
10    attorney had met with him prior to the deposition -- the  
11    citation is on the fourth bullet point here from the  
12    deposition -- and previewed the relevant paragraph from  
13    Otteman's declaration showing those dates.

14            So Mr. Landvatter saw a sworn statement from  
15    Mr. Otteman -- and this occurred after the Otteman  
16    deposition -- showing that his colleague believed this  
17    happened in 1995 to '96. He didn't have any reason to doubt  
18    that at that time. That's the basis for him saying 1995 to  
19    '96 in his opening deposition testimony.

20            But again, on cross-examination, when looking at the  
21    records, he recanted. He made it clear he never saw a  
22    prototype. So he's not useful for telling us that a prototype  
23    was made. He only provided two parts to Mr. Otteman. And all  
24    of the statements in his deposition related to the  
25    prototyping -- well, it's not even related to the

1     prototyping -- related to whether those parts were useful was  
2     his statement, that he recalled Mr. Otteman telling him that  
3     those parts worked, not that a prototype worked, not that they  
4     got put into a scope with all those other pieces, with the  
5     erector, with the tube, with the lens unit, with the moving  
6     pieces. He had no knowledge of any of that.

7             I asked him if he had seen any drawings related to  
8     those, and he said, no, and he never saw a prototype. He was  
9     just told the two parts worked. When was he told that? He  
10    didn't know. The only basis he had for thinking that might  
11    have been '95 to '96 was that he had seen the Otteman  
12    declaration ahead of time.

13            And, in fact, when I opened up his cross-examination,  
14    I asked him if he had talked to Leupold's attorney before the  
15    case. He said he had, but nothing about the case. I then  
16    challenged him on that and asked him if he had seen the  
17    declaration, and he admitted that he did, that they had shown  
18    it to him ahead of time. I don't know if that was a lapse of  
19    memory in the 10 or 15 minutes between when he saw it and when  
20    he testified about it or if he was feeling guilty about that  
21    issue.

22            Again, no probative value here. Mr. Landvatter knows  
23    nothing about a prototype.

24            Now, the last point, which is bullet point 3 on this  
25    slide, is I had Mr. Landvatter look at pictures. So over on



1 the right-hand side we have two different spiral cam designs.  
2 The top one is the image from the alleged 1995 drawings that  
3 Mr. Otteman says he provided to Mr. Landvatter, upon which  
4 parts were made. The bottom one is the 1999 drawings. And  
5 you can see the top one has an incomplete spiral; the bottom  
6 one goes more than 360 degrees around.

7 I asked Mr. Landvatter about the initial parts he  
8 made, the first ones he made for a prototype for Leupold, and  
9 he did remember it, and he said the spiral went 360 degrees or  
10 more. It was not the design that was sent by Mr. Otteman.

11 So he had no recollection of seeing a prototype, but  
12 he did remember the design he made for them was of the type  
13 from 1999. It was not the design that Mr. Otteman sent him.

14 No probative value. All evidence indicates reduction  
15 to practice happened in '99. It's Leupold's burden to show a  
16 prototype was made, and they have no probative evidence. They  
17 have a declaration that they wrote for Mr. Otteman that he  
18 recanted. They have a financial document that has nothing to  
19 do or cannot be proven to have anything to do with the '907  
20 patent, as corroboration No. 1, which was in fact the basis  
21 for Mr. Otteman's alleged recollection of the dates. So it  
22 corroborates nothing. It was the source of the information.  
23 And then Mr. Landvatter's testimony that he never saw a  
24 prototype and in fact believed that the part he made was from  
25 1999.

1           Result: They cannot demonstrate they had a reduction  
2 to practice because they cannot demonstrate a prototype was  
3 even made before the German publication. Therefore, no prior  
4 invention, the German publication anticipates, and the  
5 asserted claims are invalid.

6           There are no disputed facts here. We have on the  
7 "works for its intended purpose" no evidence, on the "a  
8 prototype was made" incredibly bad evidence, written up and  
9 designed in a way to make it look like there was something  
10 where there wasn't. And on cross-examination, all the  
11 witnesses ended up recanting.

12           All right. That ends the initial two components of  
13 no earlier invention. I will now turn to Mr. Davis for no  
14 priority date, unless there are any questions.

15           THE COURT: I don't have any questions, but I want to  
16 stop before we start a new section.

17           So why don't we come back together at 1:00, a little  
18 less than an hour.

19           MR. CASIMIR: All right. Thank you.

20           THE COURT: See you then.

21           (A lunch recess is then taken.)

22           THE COURT: Good afternoon. Be seated.

23           Proceed.

24           MR. DAVIS: Thank you, Your Honor.

25           Good afternoon, Your Honor.

1           Before the lunch break, you heard about one  
2 independent reason why the '907 patent is invalid, because the  
3 other side can't backdate their invention ahead of the  
4 Schmidt & Bender German publication in March of '98.

5           A second independent basis for invalidity is that  
6 Leupold cannot backdate the claims in the '907 patent to the  
7 1999 provisional application because the 1999 provisional  
8 application did not disclose the full scope of what was later  
9 claimed. And for that reason, the claims would not be  
10 entitled to a date earlier than the year 2000, which again  
11 postdates the 1999 German publication by more than a year, and  
12 the claims would be invalid.

13           So there's no dispute about that, that the '907  
14 patent is invalid if they do not get priority for the claims  
15 in the '907 patent itself to the 1999 provisional application.

16           That provisional application disclosed only one  
17 design for the cam hub. There was a cam groove and a cam  
18 follower pin; and we'll get to the exact language in a minute.  
19 No claim is limited to the single design that was disclosed in  
20 1999, so none of them are entitled to the 1999 filing date.

21           The timeline for this motion is quite simple. We  
22 only require two pieces of evidence and two dates. In January  
23 of 1999 Leupold filed its provisional application, which, as  
24 noted, was after they were aware of the German publication  
25 disclosing the exact same invention. January 2000, a regular

1 patent application is filed. And we'll get to the certificate  
2 of correction issues in a minute, but none of them affect this  
3 motion either. We'll assume for purposes of this motion that  
4 the other side is entitled to an earlier invention date and  
5 also that the certificates of correction were effective or  
6 that that issue is simply not relevant in deciding this.

7 So the law is somewhat difficult to apply in certain  
8 situations, but it boils down to a pretty simple principle:  
9 that you can't claim in a later patent application something  
10 that was not described in the earlier application and get  
11 priority back to the earlier application.

12 There's lots of cases cited in the briefing. This is  
13 a principle that dates back to a 19th century Supreme Court  
14 case quoted here, *O'Reilly v. Morse*: One "can lawfully claim  
15 only what he has invented and described, and if he claims  
16 more, his patent is void."

17 Claims broader than what was disclosed in the 1999  
18 application simply aren't entitled to the 1999 filing date.

19 And we've heard -- we'll get to the evidence that the  
20 other side has cited. They get into the Byron report a little  
21 bit, and we'll discuss that. But, at best, Byron and Leupold  
22 have offered some suggestion that what was claimed in the 2000  
23 application was in fact obvious in view of what was disclosed  
24 in the 1999 application, but that's not the test. Express  
25 disclosure is required.

1           And the *TurboCare* case quoted here is that which  
2       "may have been obvious is not enough to satisfy the written  
3       description requirement." That also is quoted in and the  
4       principle repeated in the *D Three* case on which we rely.

5           So touching on the *D Three* case that the other side  
6       tried to distinguish earlier today, it's actually a very  
7       simple illustration of a mechanical device similar to this  
8       one, where it's quite easy to see how what was disclosed in  
9       the earlier provisional application was not supported by what  
10      was later claimed.

11          I think the easiest example to see and one that I  
12      think Leupold has overlooked largely in the briefing is  
13      Claim 4 that was at issue in the *D Three* decision. So just  
14      walking through the facts briefly of that case, they  
15      had -- they relied on a 2009 provisional application in that  
16      case for a disclosure of what was later claimed in 2013  
17      applications.

18          Well, the original provisional application showed  
19      only one position for a washer, colored in blue on this slide  
20      50, and that was to place it above the flashing. This is a  
21      patent with claims to roof mount assemblies, such as would be  
22      used to hold a solar panel on a roof. And the washer is there  
23      to seal out the water, clearly.

24          So they disclose a soft rubber washer, and they  
25      disclose a single place to put it: above the flashing. And

1 that has something to do with some of the other details of  
2 what they claim the invention is that aren't pertinent here.

3 Well, the two simplest claims to understand at issue  
4 in that case and how that relates to this written description  
5 requirement that the other side has -- that Leupold has failed  
6 to comply with here is when they later claimed in 2013, they  
7 wrote claims that, one, expressly claimed putting the washer  
8 underneath the flashing, but there was just no disclosure of  
9 that in the 2009 application. So that claim was not entitled  
10 to the earlier filing date; and for that reason, it was  
11 undisputed also in that case that without the earlier filing  
12 date, the claim would be invalid, and it was.

13 Claim 4 is interesting because it talks about a  
14 washer, but it's agnostic about the position of the washer and  
15 the number of washers, simply recites that there is a washer.  
16 Well, that is the third example on this slide 50. Claim 4  
17 allowed the washer to be above the flashing, as it was  
18 described in 2009, which is fine, but it also allows for the  
19 washer to be placed under the flashing, and it also allowed  
20 for using a washer both above and below the flashing.

21 Those examples were not disclosed anywhere in the  
22 earlier application, and so this claim likewise was invalid  
23 because it wasn't entitled to the earlier priority date.

24 Now, how does that relate here? Well, here for the  
25 '907 patent, this is the extent of the written disclosure in

1 the provisional application filed in 1999 of the cam hub we've  
2 been discussing. It specifically called out "a spiral cam  
3 groove" and "a cam follower pin." And that is the only  
4 example in either the figures or the text of this cam hub. It  
5 has a cam groove and it has a follower pin.

6 When the regular patent application was filed in  
7 2000, the description was expanded. No new figures were  
8 added, but the written -- the text was expanded a bit. Now  
9 they call it, more generically, "a spiral cam track," and they  
10 expressly recite two embodiments.

11 "In one embodiment, the spiral cam track is a spiral  
12 groove" -- just like it was in 1999 -- "and the cam follower  
13 includes a pin."

14 "In an alternative embodiment" -- a second one not  
15 disclosed in 1999 -- the cam track may be "a spiral ridge or  
16 rail and the cam follower is a notch or fork." In other  
17 words, the second alternative embodiment allows the groove to  
18 actually be a ridge above the drive face instead of recessed  
19 into it.

20 So here we have a similar figure to what we looked at  
21 for the *D Three* case that shows the same problem. In the 1999  
22 application on the far left, one groove that was etched into  
23 or carved into the drive face and below the drive face was the  
24 cam.

25 Later, in 2000, they expanded the description in the

1 text and they also wrote broader claims. The claims, except  
2 for 6 and 16, all go -- only require a cam track, which we  
3 saw in the previous slide may be a groove or a ridge or a  
4 rail. The ridge or rail embodiment wasn't disclosed in '99,  
5 so the claims covering it are not entitled to the 1999 filing  
6 date.

7 So the parallels continue, though, with the *D Three*  
8 case. Remember Claim 4 that was agnostic about how many  
9 washers and where they were positioned, well, in the middle  
10 example -- in the third example from the left on slide 54  
11 here, we have an example that is very similar to the problem  
12 in the *D Three* case. And this goes to all of the claims,  
13 including Claims 6 and 16, which do recite in them a groove.  
14 However, it's non-limiting language, as was at issue in the  
15 *D Three* case, and it merely recites in Claims 6 and 16 that  
16 the cam track includes a groove. It doesn't limit the cam  
17 track to being a groove, which is all that was disclosed in  
18 1999.

19 So in that third example on slide 54, we've tried to  
20 illustrate just that, an example that's covered by Claims 6  
21 and 16 as well as the other claims in the '907 patent, where a  
22 ridge or rail is above the drive face and a groove is also  
23 recessed in it. And examples similar to this were provided in  
24 our brief, and while Leupold -- Leupold took issue with them,  
25 but did not actually ever disagree that they were within the



1 scope of the asserted claims of the '907 patent.

2 THE COURT: Let me interrupt you for a second.

3 When you're talking about the word "groove" -- and  
4 this kind of gets back to one of my earlier questions I think  
5 I posed to the plaintiff in the case -- does the 1999  
6 disclosure in the provisional say "groove below the drive  
7 face" or does it just say "groove"?

8 MR. DAVIS: It just says "groove."

9 On slide 52, it says "spiral cam groove formed in the  
10 drive face." And then the figures illustrate what that means,  
11 and that is recessed into the drive face.

12 THE COURT: And so do I have to, in order to resolve  
13 this problem, decide what "groove" means or can mean?

14 MR. DAVIS: Well, Your Honor, I believe you already  
15 have sufficiently answered that question for this case in the  
16 claim construction process.

17 In particular, Leupold, aware that this problem was  
18 coming down the line for them, advocated for a construction  
19 that a groove -- that a cam track is "a groove that is curved  
20 along its length." They wanted the cam track merely to be a  
21 groove. Your Honor rejected their construction.

22 And Nightforce was contending "a component of a cam  
23 hub in the form of a groove or a rail for engaging a cam  
24 follower," which expressly incorporates the additional  
25 disclosure from the 2000 application, where you have a ridge

1 or a rail and a cam follower that is a fork.

2 THE COURT: So it sounds like, from what you last  
3 read, that I was distinguishing between what a groove is and  
4 what a rail is. Is that correct?

5 MR. DAVIS: Yes, Your Honor. I think that it's been  
6 understood throughout the case that they are different.

7 THE COURT: Okay. Thank you.

8 MR. DAVIS: The plain meaning, I think, would support  
9 that as well, that a ridge or a rail is something above.

10 And I think when every witness was questioned about  
11 this, including Mr. Otteman, I think his testimony was that,  
12 you know, this was something different, was not in the 1999  
13 application, but he recalled having that idea for an  
14 alternative embodiment. And it's expressly --

15 THE COURT: Explain what you just said to me again.  
16 I didn't catch that.

17 MR. DAVIS: Yes, Your Honor.

18 Mr. Otteman, the named inventor on this patent, when  
19 he was questioned about the embodiments in the patent versus  
20 the 1999 application, he was unable to identify any disclosure  
21 in the 1999 application of a ridge or rail embodiment, but he  
22 did recall that he did have that idea being a different idea  
23 than the groove, which is later described in the 2000  
24 application here, where they expand the idea of a cam track to  
25 include a ridge or rail.

1           So it's Nightforce's view that, essentially for the  
2 same reasons as the locations for a washer were overclaimed in  
3 the *D Three* case, Leupold has overclaimed in this case that  
4 which was not disclosed in 1999 with claims, all of which  
5 cover embodiments that were not disclosed in 1999.

6           And touching on some of the evidence, other than the  
7 patent applications themselves that I showed on the timeline,  
8 Leupold has pointed to their expert, Mr. Byron, again on this  
9 issue as well. And I'd like to touch on that, because it's  
10 very -- the law is clear that the burden of production, the  
11 burden of establishing evidence sufficient to show entitlement  
12 to the earlier filing date of 1999, that burden is on Leupold.  
13 There's no presumption that they get the 1999 filing date just  
14 because they tell the Patent Office that they want to claim  
15 priority to it.

16           Okay. The *Research Corp. Technologies* case we cited  
17 in the briefing is a good example explaining the burdens on  
18 summary judgment for this issue.

19           And going back to Mr. Byron, which is all they've  
20 really offered to try to explain that alternative embodiments  
21 are supported by the 1999 application, first, on this point,  
22 Mr. Byron provides no facts or supporting analysis to support  
23 his conclusory opinion. And the Federal Circuit is strict at  
24 summary judgment on this. The expert has to set forth the  
25 factual foundation for his opinion to survive summary

1 judgment. Conclusory expert assertions do not give rise to a  
2 genuine issue of material fact.

3 And the first case that I would cite for that is the  
4 *Arthur A. Collins* case, Federal Circuit, 2000, 216 F.3d 1042.  
5 Also, the *Streck* case is a good example, S-t-r-e-c-k, at  
6 665 F.3d 1269, from 2012.

7 Simply, Byron identifies nothing in the 1999  
8 application that would establish what Leupold needs to  
9 establish here; and that is that a person of ordinary skill in  
10 the art, reading the 1999 application, would consider that  
11 Mr. Otteman, the inventor, was in possession of all the  
12 embodiments covered by the claims in the 2000 patent  
13 application.

14 The sum total of Mr. Byron's analysis on this point  
15 is a single paragraph in his report. And his report is found  
16 at ECF No. 83-2, and this quote is at 144. His conclusion is  
17 that "a rail is merely the inverse of a track" or "a groove  
18 and a cam follower that is a rail is merely the inverse of a  
19 track that is a ridge or a rail with a follower such as a fork  
20 that fits around the rail or ridge."

21 There is no explanation of how a person of skill in  
22 the art, looking at the 1999 application and its disclosure,  
23 would conclude that the applicant for the later patent  
24 understood and had within his possession in 1999 embodiments  
25 where there was a ridge or a rail instead of a groove on the

1 cam face.

2 Mr. Byron cites to two pieces of evidence in this  
3 paragraph on this issue. One is Otteman's deposition  
4 transcript, where Mr. Byron takes the position that  
5 Mr. Otteman had the idea, basically, that he reached the same  
6 conclusion when he invented -- that he "recognized at the time  
7 of his invention. . . that the groove embodiment depicted in  
8 the" provisional application "was a preferred alternative to  
9 embodiments with the inverse mechanism, such as a ridge or  
10 rail."

11 But what he doesn't say is looking at the 1999  
12 application, a person of skill in the art would reach the  
13 conclusion that Mr. Otteman understood that or considered the  
14 ridge or rail embodiment to be a part of his invention.

15 And the case law is that it's really irrelevant what  
16 Mr. Otteman thought he invented. It needs to be disclosed in  
17 the 1999 patent application. The test requires an objective  
18 inquiry into the four corners of the priority document, here  
19 the 1999 application. And that's clear from the Federal  
20 Circuit's en banc decision in *Ariad Pharmaceuticals*, 598 F.3d  
21 1336.

22 Mr. Byron cites to one other piece of evidence to try  
23 to support his conclusion that the rail or track was somehow  
24 within the scope of the 1999 application. That additional  
25 piece of evidence is boilerplate at the end of the 1999

1 application. That boilerplate said -- crafty patent lawyers  
2 add things to try to broaden stuff out. It said, "It will be  
3 obvious to those having skill in the art that many changes may  
4 be made to the details of the above-described embodiments of  
5 this invention without departing from the underlying  
6 principles thereof."

7 Well, in decisions preceding but certainly in the  
8 *D Three* case, the Federal Circuit has made clear that that  
9 boilerplate is essentially worthless these days. It's not a  
10 disclosure of anything. *D Three* tried to rely on the same  
11 type of boilerplate to support the different locations for the  
12 washer in that case, and the Federal Circuit rejected that as  
13 not being sufficient to show disclosure of the actual  
14 combinations of where the washer could be. And in that case  
15 the boilerplate read that "A person of skill in the art will  
16 recognize certain modifications, permutations, additions, and  
17 sub-combinations therefore."

18 Now, that language certainly suggests different  
19 locations for a washer might be possible, but the case law is  
20 language that makes it obvious to a person of skill in the art  
21 that there are other ways to do it is not sufficient. That's  
22 not disclosure of what the applicant considered to be an  
23 invention encompassing that obvious additional material. And  
24 the cases for that are covered in the briefing, but *TurboCare*  
25 is a good one that obvious is not the standard.

1           And no matter what they wrote in the 1999  
2 application, if that renders obvious to a person of skill in  
3 the art that you could use a ridge or rail instead of a groove  
4 on that drive face as a cam, that's not sufficient to be  
5 disclosure in the 1999 application of these additional  
6 embodiments.

7           So that's the sum total of the evidence that Leupold  
8 relies on as allegedly supporting the 1999 application,  
9 providing support for the later claims in the 2000 application  
10 that resulted in the '907 patent. It's no more than saying  
11 that it's obvious, according to Byron, that you could use a  
12 raised ridge instead of a recessed groove. And he doesn't  
13 explain the reasons why a person would reach that conclusion  
14 reading the 1999 application. But, in any event, obvious is  
15 not the standard, so it just doesn't really matter.

16           And then the evidence he cites is insufficient  
17 because the Otteman testimony is irrelevant to the issue. It  
18 just simply does not matter what the inventor thought he  
19 invented. If it's in his head and not written in the patent  
20 document to inform the public, it doesn't help them on the  
21 written description case. And the boilerplate at the end of  
22 the 1999 application, that alternative embodiments may be  
23 possible, also is just not good enough.

24           So, in summary, on slide 56, all of the '907 claims  
25 cover more than what the 1999 application disclosed; and that

1 is a cam track that is a groove and a cam follower that is a  
2 pin.

3 I think that Leupold has effectively conceded, I  
4 think, that the ridge or rail design was not in any of the  
5 asserted claims, except they argue more strenuously about 6  
6 and 16. But all of the asserted claims, other than Claims 6  
7 and 16, recite only a cam track, which the written description  
8 in the 2000 application specifies can be one of two possible  
9 embodiments, a groove or a ridge. And none of those claims  
10 require a groove, and none of them require that the cam track  
11 be a groove.

12 As to Claims 6 and 16, they recite that the cam track  
13 includes a groove and a cam follower that is a pin. But they  
14 are not limited to a cam track being a groove, which is all  
15 that was disclosed in 1999.

16 So going back to the visual on that, the three  
17 examples to the right are covered by each of the asserted  
18 claims; however, not disclosed or suggested in the 1999  
19 application.

20 And going to another basis on which Leupold attempted  
21 to distinguish the *D Three* case and other case law, there was  
22 a suggestion that unclaimed elements, because these are  
23 "comprising" or "including" claims, aren't relevant. But what  
24 we're pointing to are claimed elements. They claim a cam  
25 track. They claim a cam follower. But they disclosed only



1 one example of a cam track in 1999, a groove; and they  
2 disclosed only one example of a cam follower in 1999, and it  
3 was a pin.

4 So the claims -- asserted claims in the '907 patent  
5 simply claim more than was described in the 1999 application,  
6 so there is no effective claim to priority back to 1999,  
7 invalidating -- rendering those claims indisputably invalid.  
8 There is no dispute from Leupold that the claims could  
9 possibly be valid if they're only entitled to the 2000 filing  
10 date, and that's because of the German publication and other  
11 prior art. The German publication is more than one year  
12 before January 2000 and invalidates the claims once they're  
13 not entitled to a 1999 filing date.

14 Any questions about this segment, Your Honor?

15 THE COURT: No, sir.

16 MR. DAVIS: Thank you.

17 THE COURT: Thank you.

18 MR. CASIMIR: All right. We're now turning to the  
19 equitable estoppel. And I think this is best represented by  
20 the timeline. So let's build back a little of the history.

21 So we had the German publication sitting as prior art  
22 in March of 1998. What we haven't talked about yet and is  
23 relevant to this story is that not only Schmidt & Bender had  
24 done this first, but Nightforce had done this first. So the  
25 products that are accused of infringement use a design that

1 Nightforce was working on in the prior art time period. So in  
2 the summer of 1998, Nightforce was designing the spiral cam  
3 product which ultimately is accused of infringement.

4 We know that Leupold became aware of the Schmidt &  
5 Bender patent because we know that they received the German  
6 translation in November of 1998 and then filed their  
7 provisional application a couple of months thereafter.

8 In between the provisional application and the  
9 non-provisional application, Nightforce actually launched its  
10 first product with the spiral cam, keeping in mind that the  
11 provisional application would have been a secret document at  
12 that point. So at this point Nightforce is aware of Schmidt &  
13 Bender's work and has launched their own product.

14 And then in January of 2000, the non-provisional  
15 version of the '907 patent is filed.

16 A couple years later, in March of 2002, the '907  
17 patent issues and, in theory, could be asserted at this point.  
18 And at this point Nightforce has products on the market with  
19 the spiral cam design.

20 As we'll get into in more detail when we talk about  
21 the certificate of correction case, in 2003 Leupold files for  
22 a certificate of correction to correct what no one is  
23 disputing at this point was a failed priority claim in the  
24 original filing. And, as we'll talk about, that 2003  
25 certificate of correction is also a failure. But relative to

1 the timeline here, according to its interrogatory responses in  
2 this case, Leupold formed a belief in 2004 that Nightforce  
3 products infringed the '907 patent. So as early as 2004 they  
4 believed there was infringement.

5 In 2006, June, they send their letter alleging  
6 infringement. We don't know why they waited two years to do  
7 that, but we'll see a series of time gaps here.

8 Nightforce very quickly turned around and sent a  
9 response letter asserting invalidity, and it asserted  
10 invalidity on multiple grounds. One of them was identifying  
11 the German publication as prior art and pointing out to  
12 Leupold that they did not have a priority claim that would  
13 allow them to avoid it.

14 In December we get a second letter from Leupold  
15 following on and saying, "We've looked at your information.  
16 We believe you infringe." And notably in that letter they  
17 say, "Look at the certificate of correction that was part of  
18 the patent we gave you in our first letter."

19 So we know from that record that when Nightforce was  
20 arguing in 2006 that there was no priority claim, it was aware  
21 of that 2003 certificate of correction and had deemed it not  
22 functional. So at this point in 2006 Leupold was warned that  
23 it did not have a proper priority claim.

24 What happened next from Leupold? Almost 10 years of  
25 silence. So we have this very, very long time gap. Leupold,

1 to our knowledge, did nothing during this time period.  
2 There's no evidence anything was done during this time period.  
3 But Nightforce did do some things.

4 So we know from Ray Dennis, the party who was relying  
5 on Leupold's inactivity, who was deposed -- and we heard about  
6 testimony earlier today -- in 2007 assumed that Leupold had  
7 abandoned its claim. There were these 2006 communications.  
8 About a year went by, and there was an assumption that Leupold  
9 had gone away and would not come back.

10 By the year 2012, six years after their initial  
11 infringement letter, damages are going away. So we know that  
12 statutorily at this time, when laches was still around as a  
13 doctrine, you couldn't get damages six years back. So by 2012  
14 there is infringement that -- alleged infringement that  
15 Leupold was aware of and they were sacrificing damages, just  
16 giving them up. That doesn't make any sense.

17 And as you'll see in the briefing, we cited a Central  
18 District of California case on exactly this issue, holding  
19 that extensive silence to this effect can only be explained as  
20 misleading behavior. Why would any rational person give up  
21 damages if they're aware of an infringement?

22 2013 to 2014 Nightforce does more things. They  
23 dramatically expand their product offerings, both by sales  
24 volume and number of different scopes incorporating the spiral  
25 cam design. We're now many, many, many years after the

1 original infringement letter and many years after the  
2 assumption that Leupold had gone away. That was rational  
3 behavior.

4 More years go by and then we get the third Leupold  
5 letter in March of 2016, alleging infringement of a number of  
6 patents, all of the patents in this case, including the '907  
7 patent.

8 Nightforce turned around and responded, explaining  
9 why, again, the '907 patent was invalid, this time  
10 highlighting its own 1999 sales, keeping in mind the 1999  
11 sales are prior art to the regular patent but not the  
12 provisional. So, once again, Nightforce is making it clear  
13 there is no proper priority claim because it is highlighting  
14 prior art that is only prior art if there is no priority  
15 claim.

16 Unbeknownst to Nightforce at the time, apparently  
17 looking into this issue, Leupold files the 2016 certificate of  
18 correction to add that priority claim that had been missing up  
19 until that date.

20 Then in August of 2016 Leupold filed this lawsuit  
21 without the '907 patent. They sued on every other patent  
22 mentioned in their 2016 letter. The '907 was left out. Once  
23 again, the only conclusion that Nightforce can draw from that,  
24 based on what it knew, was yet again they weren't interested  
25 in asserting that patent.

1           The certificate of correction adding the priority  
2     claim issued in February. And then for the first time in the  
3     10-plus-year time period, Nightforce believes they're going to  
4     get sued because they were sued. An Amended Complaint was  
5     added including the '907 patent.

6           So a fairly classic timeline for estoppel:  
7     Infringement contentions were made. A massive amount of time  
8     went by. And Nightforce relied on that to expand its  
9     products.

10          Let's get into the legal issues. There are three  
11     requirements to demonstrate equitable estoppel: number one,  
12     misleading conduct; number two, reliance on the misleading  
13     conduct; and, number three, prejudice. And in this case  
14     Leupold does not dispute that there is prejudice, so what  
15     we're talking about is: Was there misleading conduct and was  
16     there reliance?

17          Leupold's initial presentation today and all of its  
18     briefing focus on the silence and they ignore the other  
19     misleading conduct. The silence wasn't the only misleading  
20     conduct. So we have the silence from 2007 to 2016, but we had  
21     a failure to correct that priority claim. And we know  
22     that -- there's no dispute in this case, without the priority  
23     claim, the '907 patent is invalid. There's no dispute from  
24     the parties on that issue.

25          So that patent sat out there until 2017 without that

1 correction, sitting out there invalid. That's misleading  
2 behavior. If Leupold ever intended to assert that patent,  
3 they would have, should have fixed that priority claim so it  
4 would have been in a position to assert. It was not.

5 And we saw that in 2016 when they filed the lawsuit  
6 and did not include the '907. They waited until that  
7 certificate of correction was granted adding the priority  
8 claim before they brought it, giving up more damages. Again,  
9 the tail end of that six-year window is disappearing.

10 Earlier today we heard that that was simply a  
11 belt-and-suspenders correction to what Leupold asserts was a  
12 2003 appropriate certificate of correction. Their behavior  
13 belies that. The certificate of correction itself in 2016  
14 admitted they made an error.

15 The loss of damages and the waiting to file the  
16 lawsuit and, again, not sending a letter to Nightforce saying,  
17 "We're waiting to fix the certificate of correction here.  
18 We're going to sue you," but just silence again, no lawsuit on  
19 the '907, everything from the outside looks like they're not  
20 asserting it. And the fact that they weren't in a position to  
21 assert it without fixing that priority claim is independent  
22 misleading behavior.

23 Then we have the unexplained surrender of past  
24 damages. The Central District of California case cited in the  
25 briefing: There's no logic to giving up past damages. The

1 public view of that would be that you don't intend to assert  
2 your patent. And in this case, when we tie in the failure to  
3 correct the priority claim -- Leupold was put on notice about  
4 that in 2006 by Nightforce pointing out that they did not have  
5 a priority claim.

6 No assertion of the '907 in the 2016 Complaint itself  
7 again continues the misleading conduct, with no letter  
8 explaining it or other indication explaining it.

9 There's been no enforcement against third parties.  
10 Other companies are out there with spiral cam designs.  
11 They've never been sued and weren't sued during that window of  
12 silence. It's not just Nightforce.

13 There's been no patent markings. So Leupold has  
14 admitted in their interrogatory responses that they've never  
15 marked any products with the '907 patent, even though they  
16 sell products themselves with the '907 patent design. So,  
17 again, what does that convey to Nightforce and the public?  
18 That they don't have a patent they intend to assert.

19 And, lastly, the patent is nearly dead due to its  
20 life span. Nightforce has been on the market since before the  
21 patent was filed with their product. And almost all of the  
22 patent life has expired before they brought the suit, again  
23 conveying to the Nightforce and the world they never intended  
24 to assert this. There's lots of misleading conduct besides  
25 the silence itself.



1           Let's turn to reliance. And the citations are here.  
2           This is referring to testimony from Ray Dennis, who is the  
3           owner of Nightforce. Nightforce assumed that Leupold had  
4           abandoned its claim in 2007, citation to Mr. Dennis's  
5           testimony. Nightforce significantly increased its product  
6           offerings during that period of silence, relying on the fact  
7           that they were not going to be sued.

8           And then we didn't hear about this earlier today, but  
9           Mr. Dennis testified that Nightforce would have designed  
10          around the '907 patent had Leupold asserted that patent early  
11          and put it in a position to be enforced.

12          So when we heard earlier today about Mr. Dennis's  
13          testimony saying in 2007 he wouldn't have done anything  
14          different because the patent was invalid, we're dealing with a  
15          different fact pattern than the case law that Leupold was  
16          relying on because we're not dealing with a situation where  
17          the misleading conduct was just silence. The misleading  
18          conduct here was also their failure to correct that priority  
19          claim. That patent was not in a position to be asserted.

20          So when Mr. Dennis is talking about what he would  
21          have done in 2007 if they had brought suit, that patent was  
22          not in a position to do anything. They hadn't fixed it yet.  
23          So all the testimony they pointed to was on a side issue. The  
24          corrected patent was not there in 2007. And Mr. Dennis  
25          testified that if it had been, Nightforce would have designed

1 around it.

2 Leupold also pointed to contemporary testimony of  
3 whether Nightforce has designed around it since they have  
4 brought suit. And Mr. Dennis replied at this point that  
5 they're not going to because we're in a different situation  
6 than we were in 2006. It's a different issue.

7 So technically for estoppel, Leupold doesn't need to  
8 give excuses for its misleading behavior, but it would  
9 certainly be helpful to explain why all of these things  
10 happened, because we have to look at it, from an estoppel  
11 standpoint, based on what Nightforce believed and was it  
12 reasonable to believe those things. And these aren't  
13 reasonable to believe.

14 There's no excuse for nearly a decade of silence.  
15 There's no excuse for waiting until 2017 to correct that  
16 priority claim. There's no excuse for surrendering the past  
17 damages or for not asserting the '907 in the 2016 Complaint.  
18 If the certificate of correction was just belt and suspenders,  
19 why wasn't it brought in the 2016 Complaint and then the belt  
20 and suspenders dealt with afterwards?

21 There's no excuse for no patent marking. They're  
22 conveying to the world this patent is not going to be asserted  
23 or exist. And there's still no excuse for not going after  
24 others, which they still have not today.

25 Leupold introduced a few arguments against the

1 reliance, Nightforce's reliance position, but they're  
2 irrelevant or not sufficient for defeating the motion.

3 First of all, they highlighted a statement from  
4 Mr. Johnson, who was Nightforce's 30(b)(6) deponent, initially  
5 identified to speak on many topics, one of which was estoppel.  
6 And we saw the quote earlier today from that testimony where  
7 he was being asked whether he was aware of Leupold having any  
8 fraudulent behavior and he responded in the negative.

9 What we didn't see was the context of that question.  
10 It was not in the context of the '907 patent. It was not in  
11 the context of estoppel. It was right in the middle of a  
12 discussion of the Windauer patents, out of the blue; and one  
13 could only presume, if one was in the deponent's seat, it was  
14 about the Windauer patents.

15 If you read that in context, there's no way  
16 Mr. Johnson could have understood that this was going to be  
17 used in the context of estoppel or was on the topic of  
18 estoppel. This was apparently a strategic "gotcha" stuck in  
19 the middle of a series of unrelated deposition questions.

20 Mr. Johnson was later asked about the issues on the  
21 '907 patent and about reliance and issues associated with  
22 estoppel, and he pointed Leupold's counsel to Mr. Dennis as  
23 the person who would know that information. Mr. Dennis was  
24 subsequently deposed and testified about the reliance we're  
25 talking about here. So the out-of-context question of

1 Mr. Johnson is not a defense or a disputed fact that allows  
2 Leupold to avoid the motion.

3 Leupold also made a legal argument that if there's  
4 any inference at all that could be drawn for why the silence  
5 existed for so long, that the motion can be defeated.

6 Well, two points on that. First, that only addresses  
7 the silence and not the other misleading behavior. They need  
8 to address all of the misleading behavior. Second, the  
9 inferences they raise in their motion or in their briefing on  
10 this motion are not credible.

11 And we received three inferences: number one, that  
12 Leupold believed that Nightforce might have stopped  
13 infringing. That's not a useful inference, because the issue  
14 on estoppel is what Nightforce believed, not what Leupold  
15 believed. They're basically saying they didn't sue because  
16 maybe they thought that Nightforce stopped infringing.

17 We know that's not the case, though, because we know  
18 from their interrogatories that they disassembled multiple  
19 Nightforce scopes over time, including in 2008 and 2016. They  
20 were aware that Nightforce was still using the spiral cam  
21 design. That inference is not backed up by fact nor is it  
22 relevant because the issue is what did Leupold convey to  
23 Nightforce, not what did Leupold internally believe.

24 Next they argue an inference that maybe Leupold was  
25 waiting for Nightforce to respond to their communication in

1 2006. That might be an argument for March of 2007 or maybe  
2 August of 2007. It's not an argument for 2016 or 2017. It's  
3 not rational or reasonable to think that they were waiting for  
4 10 years for Nightforce to get back to them. And, again,  
5 Leupold's state of mind here is not relevant; it's  
6 Nightforce's state of mind.

7 Lastly, Leupold argues that an inference that could  
8 be drawn is that Leupold would ultimately enforce the patent.  
9 Maybe they were just going to wait 10 years. Again, not  
10 reasonable. They would be giving up damages. And the  
11 evidence says otherwise, because we have testimony from  
12 Mr. Dennis on this point. Ray Dennis said that by 2007  
13 Nightforce believed that Leupold had abandoned its claim. So  
14 we know that that inference is not real.

15 And, again, these arguments only address the silence,  
16 not the other misleading conduct.

17 Lastly, Leupold raises an equities argument, which  
18 Your Honor had some questions about earlier today, related to  
19 photographs and cameras and dates. That's really a nonissue  
20 and I think even factually misdescribed.

21 In the 2006 letter Nightforce identified two pieces  
22 of prior art: the German publication, explaining there was no  
23 priority claim. They also identified the earlier Schmidt &  
24 Bender scopes, identifying that they had obtained a scope in  
25 2007 and 2008 that had the spiral cam design. There was no

1 discussion of photographs. All of that came in the  
2 2016-to-2017 discussions, so they're points off topic here.

3 Further, Leupold was not in any way deceived by this  
4 if they somehow thought it was a deceptive comment. In the  
5 follow-up letter from Kassim Ferris in 2006, he indicated  
6 Leupold investigated that issue and determined that it had no  
7 merit. They were not deceived, to the extent any deception  
8 could be interpreted there. So factually wrong and a  
9 nonissue.

10 All equities here favor a ruling of estoppel. We've  
11 got an unjust 10-year delay where Nightforce dramatically  
12 expanded its business. And to this point, based on Leupold's  
13 damages expert's numbers, over 97 percent of the damages  
14 asserted in this case come from the '907 patent and they're  
15 tied to the six-year window between 2010 to 2016.

16 So this is a classic, classic estoppel case. It's a  
17 "gotcha." It's a "We're going to threaten you. We're going  
18 to make it look like we're never going to assert this patent  
19 to you and everyone else out in the world, and then we're  
20 going to wait until you do dramatically high volumes of  
21 product sales, and then we're going to sue you when you did  
22 that believing we weren't going to."

23 THE COURT: So I would have to find for this  
24 particular argument not only that there was misleading  
25 conduct, but that the purpose of the misleading conduct was

1 intentional and the intent was to mislead Nightforce all  
2 along?

3 MR. CASIMIR: There is a -- you'd have to find that  
4 the misleading conduct was misleading. How strong is the  
5 intent component?

6 THE COURT: That's a question. Is it simply  
7 misleading conduct or is it intentionally misleading conduct,  
8 and the intent going to, as I suggested, setting up --  
9 essentially it's a setup: "We are intending to set Nightforce  
10 up."

11 MR. CASIMIR: It does not need to rise to that level.  
12 It can be misleading conduct.

13 THE COURT: Just simply misleading conduct, without  
14 an intent element attached to it?

15 MR. CASIMIR: Correct.

16 THE COURT: Okay. Thank you.

17 MR. CASIMIR: Yes.

18 So we have this unjust delay in adding the priority  
19 claim. It doesn't make sense why they waited. We have this  
20 unjust public perception of no intent to enforce.

21 And then one of the problems we have when parties  
22 wait so long to file lawsuits is documents disappear, and  
23 that's been a problem in this case. So we learned -- and  
24 we'll come back to this in the certificate of correction  
25 section.

1           There were the e-mails earlier today where Leupold  
2           was investigating when Schmidt & Bender first put their  
3           product on the market and was told they did so in 1997. Those  
4           e-mails were back-and-forth communications where Leupold was  
5           talking to Schmidt & Bender, and Schmidt & Bender apparently  
6           had the records because Hans Bender was able to look it up and  
7           tell them.

8           We subpoenaed Schmidt & Bender in this case for those  
9           same records and were told that everything has been destroyed.  
10          Had they brought suit in 2006, timely, we wouldn't be a  
11          decade-plus away from the facts. We wouldn't have missing  
12          evidence that would have otherwise been there related to the  
13          invalidity.

14          One of the rationales for estoppel is it is unfair to  
15          create this late situation where a party has to defend  
16          themselves, not only after they've relied on everything, but  
17          where they're basically at the mercy of this extreme delay on  
18          all fronts, including lack of evidence to defend itself,  
19          although, as we'll see, there is plenty of evidence to defend  
20          itself.

21          That's the end of my equitable estoppel presentation.  
22          Let me stop there and see if you have any questions.

23                 THE COURT: No. Thank you.

24                 MR. CASIMIR: All right. Let's turn to the last of  
25          the four positive motions that Nightforce has filed.



1           This is a simple one, which is the certificate of  
2     correction issue. Nightforce has moved for a ruling that  
3     damages on the '907 patent cannot start until the certificate  
4     of correction from 2017 was granted adding the priority claim,  
5     because up until that point the patent was invalid and there  
6     were no damages to be had. And we do have this convenient  
7     situation here where the parties are in agreement that if  
8     there is no priority claim, the patent is invalid.

9           And we've cited the *Southwest Software* case as a  
10    case supporting the concept that damages begin no earlier than  
11    the certificate of correction. So when you fix a patent with  
12    a certificate of correction, that's when your damages begin.

13          Timeline: This story also works well off of a  
14    timeline. So the '907 patent was filed in January of 2000.  
15    It had a priority claim listed on an inventor declaration.  
16    Under the law, that is not a priority claim. And they're not  
17    disagreeing with that. They filed a 2003 certificate of  
18    correction to try to fix that issue.

19          And, in fact, the *Carotek* case that they cite to  
20    support their position in this case makes it clear that doing  
21    such a thing is applicant error. It's not a mistake by the  
22    Patent Office. They gave some information to the Patent  
23    Office about a priority claim, but the fact that the  
24    information did not get onto the patent in the right location  
25    is applicant error according to Leupold's own case.

1 All right. Along comes 2003, where they filed the  
2 first certificate of correction. That did not fix the  
3 problem. In this case it had multiple problems associated  
4 with it. First, it once again put the priority claim in the  
5 wrong location.

6 The *Carotek* case which Leupold is relying on to  
7 excuse this behavior -- and, mind you, I believe this was a  
8 District of Massachusetts case; this is not well-established  
9 precedent -- excused an error that was not the same, which is  
10 to say in the *Carotek* case the Patent Office contributed to  
11 the mistake, in terms of where the priority claim ended up.  
12 It was not purely applicant error, as it was here with  
13 Leupold.

14 Further, we know from *Carotek* that the original  
15 problem that's trying to be corrected in 2003 was applicant  
16 error. There are two ways you can file certificates of  
17 corrections. One form you file if it was the Patent Office's  
18 mistake, and that's free. The Patent Office does not require  
19 you to pay for Patent Office errors.

20 The second requirement is -- or, I'm sorry, the  
21 second document is one where it's the applicant's error and  
22 you have to pay a fee. You have to pay the Patent Office for  
23 their time and energy to correct the mistake that you, as the  
24 applicant, made.

25 So not only was the 2003 correction wrong because,

1 again, the priority claim was put in the wrong location, it  
2 was filed as a Patent Office error, which it was not, and the  
3 fee was not paid. That fee is required. So on multiple  
4 bases, that certificate of correction was invalid.

5 And, as we know, we had this long period of silence  
6 and only in 2016 was a new certificate of correction filed,  
7 which ultimately issued in 2017, which is where the damages  
8 would start if there were any. In this certificate of  
9 correction they acknowledged it was applicant error, they paid  
10 the fee, and they used the right form and they put the  
11 priority claim in a location that is suitable for the  
12 government to submit it.

13 They argued earlier today that that was just belts  
14 and suspenders. I would say it was belts and suspenders only  
15 in the sense that these patent documents have specific rules  
16 because there's notice issues to the public, and the Patent  
17 Office requires that fees be paid and the correct forms be  
18 used. So if the belt is a fee and the suspenders is the  
19 correct form, I agree it was belts and suspenders, but belts  
20 and suspenders were required. The 2003 certificate of  
21 correction was not a valid correction. That's why they did it  
22 later on. That's why they waited to file suit.

23 That is the end of the certificate of correction  
24 portion. Let me see if there are any questions on that.

25 THE COURT: No.

1 MR. CASIMIR: All right. We're now going to shift  
2 from those issues on which Nightforce has affirmatively moved  
3 to those where only Leupold has. So we're going to switch  
4 mindsets here as well. In this case now what we're looking  
5 for is: Are there disputed factual issues so that Leupold's  
6 motions can and should be denied?

7 Let's start with the invalidity position on the  
8 Altenheiner patent. You'll recall, this is the patent with  
9 the binoculars. The Altenheiner patent is ancient. It goes  
10 back to 1978. So there's no dispute from that perspective  
11 that it is prior art that significantly predates the '907  
12 patent, any of its dates. And it's more than one year before  
13 the provisional date, so it qualifies as prior art under  
14 102(b). Invention dates become irrelevant. Nonetheless, it's  
15 before the alleged invention date as well.

16 You'll see a picture on the right showing a mechanism  
17 that is essentially identical to what we see in the '907  
18 patent in terms of a spiral cam used to adjust optics.  
19 Leupold's only alleged difference on why the Altenheiner  
20 patent does not anticipate or make obvious the claims of the  
21 '907 patent is that it's binoculars and not a riflescope. So  
22 we have a fairly simple issue here.

23 So there is an initial question of whether a  
24 riflescope is actually a distinction for anticipation. So  
25 Nightforce's position is it's obvious to use the design in the

1 binoculars in a riflescope, and that's backed up by expert  
2 testimony. It's backed up by Leupold's own witnesses'  
3 testimony, so we have plenty of evidence on that.

4           However, it goes one step further. The claims are  
5 broad enough that they don't exclude binoculars. So the  
6 claims recite "a telescopic rifle sight," not riflescope. As  
7 mentioned today, that language is in the preamble of the  
8 claim, and there was an argument about whether that should  
9 count as an element or not in a discussion about during claim  
10 construction we talked about preambles. We did talk about  
11 preambles for other patents. We did not talk about them for  
12 this case.

13           And now we run into a situation that was introduced  
14 in our response briefing to Leupold's opening motion.  
15 Leupold's opening motion moved for summary judgment on every  
16 issue of validity and every issue of infringement of every  
17 claim -- nearly every claim of every asserted patent, over 70  
18 claims in a 35-page document. They raised hundreds and  
19 hundreds of issues. Our response to that, being limited to 35  
20 pages, responded to each of those, giving at least one example  
21 of why there was a factual dispute, but could not thoroughly  
22 address every one of the issues by argument in the briefing.  
23 We provided citations, similar to what they did for  
24 distinctions.

25           One thing Leupold did not do in its very brief

1 multi-hundred issue opening motion is develop its claim  
2 construction arguments. It did a cursory job of almost  
3 everything in introducing its arguments, including claim  
4 construction. We heard part of their claim construction  
5 argument on this point today, but its briefing does not  
6 develop the case. So this issue of anticipation remains an  
7 open issue on summary judgment.

8 Further, we know that binoculars can be used as  
9 telescopic rifle sights. How do we know that? So initially  
10 during the expert report stage in this case, Leupold argued  
11 that various of Nightforce's experts lacked design experience  
12 in riflescopes and therefore could not opine on certain  
13 issues. We responded by noting that their own expert,  
14 Mr. Byron, has never designed riflescopes and that the experts  
15 were all equivalently placed. Mr. Byron, Leupold's expert,  
16 has some experience in gun part design, as does  
17 Mr. Brandenburg, not highlighted earlier today, but they're  
18 all equivalently placed.

19 As a defense to that, Leupold made the point of  
20 saying that, no, in fact, while he hasn't designed  
21 riflescopes, Mr. Byron, their expert, did work on sighting,  
22 riflescope sighting. And the only example of his lifetime  
23 experience related to that was using binoculars to sight  
24 riflescopes. So it's fairly disingenuous that we're hearing  
25 that binoculars cannot be used for sighting riflescopes when

1 Leupold's own expert's only experience at all in designing  
2 rifle aiming systems involved binoculars.

3 Now let's turn to the obviousness piece, which is not  
4 an afterthought argument, but a primary argument.

5 So Leupold's defense to the obviousness argument is  
6 that riflescopes and binoculars are not analogous fields and  
7 that people would not look to the binocular arts to design  
8 riflescope parts. And their expert, Mr. Byron, talks about  
9 that, even though he had used binoculars himself in an aiming  
10 system, which is rather curious.

11 More importantly, Mr. Otteman, the inventor of the  
12 '907 patent, was asked about this and testified that not only  
13 did it happen, but it was common to look at features from one  
14 optical product, like a binocular, and use that information to  
15 help design other products like riflescopes. And, in fact,  
16 that happens at Leupold. Mr. Otteman does it himself. He has  
17 patents on both binoculars and riflescopes.

18 In the deposition of Mr. Regan, who is the inventor  
19 of the '305 patent, who in his various stages at the company  
20 supervised engineers and design people, testified that  
21 Leupold, first, makes both products -- that's obvious from  
22 their website -- and has during this entire time window, and  
23 that the design engineers for both types of products  
24 interacted with the various inventors, so inventors who in  
25 this space are working with design engineers from both fields.

1           We clearly have at least a disputed fact as to  
2           whether one of ordinary skill in the art would look at  
3           binoculars in helping select design features for riflescopes.

4           Furthermore, we have Mr. Brandenburg's testimony on  
5           this, Nightforce's expert. He has expert reports on this.  
6           The primary -- I believe the only defense we're hearing from  
7           Leupold is that he's not qualified to talk on that topic.

8           He is qualified to talk on that topic. He has  
9           designed gun parts. He is an expert on designing small  
10          components used to adjust other features. He has as much  
11          design experience with riflescopes as Mr. Byron does in that  
12          neither of them has designed riflescopes; they've both worked  
13          on guns.

14          At this point Leupold has not developed a case  
15          sufficient to remove Mr. Brandenburg's testimony. We haven't  
16          had motions on that issue yet, so we have lots of disputed  
17          facts, with a debate among experts about who is right. In  
18          this case we have Nightforce's expert and Leupold's inventor  
19          on one side and Leupold's expert on the other.

20          Any questions on Altenheiner before I shift to the  
21          Schmidt & Bender products?

22                 THE COURT: No.

23                 MR. CASIMIR: All right. Now we have these old  
24          scopes that were sold by Schmidt & Bender prior to the Leupold  
25          patent. I think we can simplify this issue a lot. Almost



1 everything we heard about this morning, Leupold was assuming  
2 that they were entitled to a January 1999 provisional filing  
3 date and that they could go back with earlier invention dates  
4 to prior to the German publication. Obviously Nightforce has  
5 moved on those issues, and we believe that there is no dispute  
6 on those issues, that summary judgment can be granted.

7 Now, when we're talking about Leupold's motion here  
8 for validity, Leupold has to take the position that there's no  
9 argument on that issue, that they are entitled -- that there  
10 are no factual disputes, that they are entitled to their  
11 priority date and that there's no factual disputes, that they  
12 are entitled to an earlier invention to predate the German  
13 publication.

14 Of course that's not the case. So the relevant date  
15 here for the Schmidt & Bender product sales is January 31,  
16 2000, the filing date of the patent or, at its earliest,  
17 January 29, 1999, not some earlier date. And it strains  
18 credulity that Schmidt & Bender prepared for a commercial  
19 launch in 1997 and then didn't launch the product until after  
20 January 31, 2000.

21 So the question is: Can the jury, from the evidence  
22 of record, conclude that Schmidt & Bender had products on sale  
23 in the U.S. prior to January 31, 2000? There can be no doubt.

24 Let's look at our last timeline. So in 1997  
25 Schmidt & Bender starts advertising this product and starts a

1 commercial ramp-up. How do we know that? This product was  
2 not just in advertising, but it was in their 1997 catalog for  
3 sale.

4 Now, we heard earlier today questions about whether  
5 that -- whether the pictures in those advertisements in the  
6 catalog show the spiral cam design. They don't. But we know  
7 the names of the scopes. Those are in the catalog and the  
8 advertisements; and those scopes, by name, are the ones that  
9 had the spiral cam. We know that from later documents and  
10 information.

11 So we then had e-mails from Leupold's own  
12 investigation of when these products were on sale. And they  
13 did this investigation prior to threatening Nightforce of  
14 infringement. Apparently they wanted to see how they stood  
15 before they moved ahead.

16 So one of those e-mails -- and we just saw the header  
17 of it earlier today; we didn't see the content of it -- was  
18 Leupold inquiring, clearly for the purpose of determining  
19 whether the Schmidt & Bender products were prior art, of  
20 Schmidt & Bender when those products were on sale. Because  
21 the questions were crystal clear. They were "When did you  
22 bring this -- when was this sold into the U.S.? When was this  
23 brought into the U.S.?" And the response from Schmidt &  
24 Bender was "We shipped into the U.S. in December of 1997,"  
25 really, really early and consistent with their advertisements

1 and magazines.

2 Now, Leupold has argued that we should -- we should  
3 ignore that evidence because it's hearsay. Now, we haven't  
4 had any evidentiary hearings on whether it's hearsay. There  
5 are multiple grounds by which it cannot be considered hearsay,  
6 that it's not hearsay; for example, 801(d)(2)(B), which  
7 relates to the fact that Leupold's 30(b)(6) witness on these  
8 issues admitted during his deposition, after seeing those  
9 e-mails, that he believed there was no reason to doubt it and  
10 assumed it to be true, the content. So we have an adopted  
11 admission from Leupold.

12 Also, 801(d)(2)(E), we don't have evidence in front  
13 of you on this, but we'd be happy to raise this if we want to  
14 have an evidentiary hearing on these documents, but this  
15 relates to -- it's not quite the alternative, because they can  
16 coexist, but there's evidence that Schmidt & Bender and  
17 Leupold were working together related to this patent to  
18 enhance its ability to assert it.

19 They actually had a secret license agreement between  
20 the two of them where Leupold gave up all of their worldwide  
21 rights on this in exchange for access to the German patent,  
22 which was only good in Germany and it was only good for 10  
23 years and had very little commercial value. They gave up the  
24 store for this patent. And then there were these various  
25 communications between the parties with some very suspicious

1 language in it, where it looked like they may have been  
2 working together on this issue.

3 Again, we can get into that if you want to have a  
4 hearing. But there's not a basis, as we sit here today, to  
5 dismiss these e-mails.

6 All right. What happened after that? We also know  
7 from these e-mails that additional products hit the market  
8 under different names from Schmidt & Bender in 1998 and 1999,  
9 well before the 2000 filing date. It wasn't just that first  
10 one.

11 We also know that Nightforce obtained and tore apart  
12 one of these scopes and took photographs of it. We have those  
13 photographs, and they show the spiral.

14 Now, we heard a lot this morning about the date on  
15 those photographs, whether it was March of '97 or some later  
16 date. We don't need to rely on the March of '97 date here.  
17 The person who did the tear-apart was deposed, and he  
18 indicated why they did it.

19 You'll recall that Nightforce had designed their own  
20 spiral cam design and launched it as a product in 1999. They  
21 did this tear-apart to look at what other people were doing.  
22 And there's faxes and other documents showing that this  
23 information about the Schmidt & Bender design was being sent  
24 to a contract manufacturer that Nightforce was using to figure  
25 out how to do their own design. And we know from that

1 testimony that that happened no later than June of 1998.

2 So there was a question about when were these  
3 photographs? Are they after March of '97? For the purposes  
4 of this issue, we're happy to have them be June of 1998,  
5 significantly predating the 2000 date that's relevant here.

6 So we have a catalog offering to sell the product in  
7 1997. Nightforce got their hands on an actual product, opened  
8 it up, and demonstrated that it had the spiral design in 1998,  
9 all in the relevant prior art time period.

10 And then just putting in a few other dates here, we  
11 know that Schmidt & Bender filed their own patent application  
12 on this design in '97, consistent with the fact that they're  
13 commercializing around that time period. It published in  
14 March of '98, and the Leupold provisional and the Leupold  
15 patent were well after these dates.

16 A jury can reasonably conclude that there's a -- a  
17 reasonable basis for saying, by clear and convincing evidence,  
18 Schmidt & Bender was selling products prior to these patent  
19 dates, based on the evidence in the record.

20 Any questions on the Schmidt & Bender prior art?

21 THE COURT: No. Thank you.

22 MR. CASIMIR: All right. We'll turn to the very last  
23 issues on the '907, which are the infringement issues.

24 We heard earlier today that there are two issues for  
25 non-infringement, one related to actuator, one related to the

1 pin. Pictured on this slide is a photograph from Leupold's  
2 infringement contentions, looking down into the scope where  
3 the knob has been removed, where they point to the bushing as  
4 the cam follower -- that's part of the actuator -- and then  
5 something down below it as the additional part of the  
6 actuator.

7 The '907 claims don't just say "actuator." So we  
8 heard earlier today that this issue was being posed in the  
9 context of claim construction of "actuator." It's not. The  
10 issue here is that the claims tell us about how the actuator  
11 interfaces with the other components. The non-infringement  
12 position here is that Nightforce's products don't interface in  
13 that way.

14 So we walked through Claim 10, for example,  
15 independent Claim 10, in our original technological  
16 introduction and noted that the language in that claim  
17 requires that the knob that contains the actuator project  
18 outwardly from the exterior of the housing. So that claim  
19 requires that the actuator be outside of the housing. It's  
20 not in the Nightforce products. It's tucked away inside.

21 THE COURT: Does it break the plane of the housing?

22 MR. CASIMIR: So Mr. Brunette earlier today suggested  
23 it did. It does not.

24 So if we look at the next slide, this is a higher res  
25 of the figure that he showed where the -- we can see the

1 component on the inside there identified as the actuator and  
2 the bushing, which they're identifying as the cam follower.  
3 The dimensions there tuck that well down on the inside.

4 There are some engineering drawings associated with  
5 this product that were in Mr. Byron's expert report that show  
6 a side view and show that it's below. They're fairly poorly  
7 resolutioned, so I didn't show that slide. But it is tucked  
8 away inside.

9 THE COURT: So I don't know that -- is there  
10 anything -- any way that I'm going to be able to look at it  
11 and say, yes, conclusively it's one way or the other? Because  
12 you're both telling me different things. And, honestly, by  
13 looking at the diagram, I'm not convinced one way or the  
14 other.

15 MR. CASIMIR: This is a CAD drawing of the actual  
16 product, based on the dimensions. It does show, if you were  
17 to move those pieces, that it would be within the housing at  
18 that point.

19 But no, there is no evidence in the record presented  
20 for summary judgment that lets you know one way or the other.

21 THE COURT: Thank you.

22 MR. CASIMIR: All right. So we have disputed facts  
23 on that issue, at least.

24 Let's turn to the pin so while we're on this figure,  
25 we can look at it. So Leupold's expert initially took the

1 position that the bushing was a pin. But the parties agreed  
2 to claim construction language on what a pin is that made the  
3 bushing not qualify. So Leupold changed direction and they've  
4 argued that the screw, identified as No. 6 in this drawing, is  
5 in fact the pin, even though as it's used, it's completely  
6 encompassed by the bushing.

7 In fact, if we turn back to the photograph, looking  
8 at a top view, you can see part of the screw head shows  
9 through a hole on the top of the bushing, showing that the  
10 screw is entirely encompassed within the bushing. You can  
11 also determine it and see that from the figure. The bushing  
12 sits over the screw. The screw is covered up. It is the  
13 bushing that is the cam follower. It is the bushing that  
14 makes contact with the groove and does the operation, not the  
15 pin inside of it.

16 So now we're hearing argument that the pin in  
17 fact -- or, sorry, that the screw is the pin of the claims.  
18 That's all attorney argument. That's not supported by expert  
19 testimony. That's sort of a late game change by Leupold and  
20 not sufficiently supported in their summary judgment documents  
21 in a manner that allows them to obtain summary judgment of  
22 infringement on this issue.

23 Furthermore, this whole -- so the pin issue relates  
24 to Claims 6 and 16. And we saw earlier today the claim  
25 language said that the cam follower includes a pin. And so at



1 this point, even though the pin is not used as a cam follower,  
2 Leupold is attempting to read Claim 6 to not require a pin cam  
3 follower.

4 The claim language, when it says that the cam  
5 follower includes a pin, I think any reasonable interpretation  
6 of that and any reasonable claim construction on that implies  
7 that the pin is acting as the follower.

8 Now, again, there hasn't been claim construction  
9 developed on this. This is Leupold's motion. They haven't  
10 developed this thoroughly. We're not in a position to rule on  
11 that one way or another.

12 It's also inconsistent with the specification in  
13 terms of saying that this thing contained in something else  
14 can be the cam follower. It raises the question of can  
15 anything be a cam follower if it has a pin in it, even if the  
16 cam follower otherwise seems not to look anything like a pin  
17 or behave like a pin or isn't a pin? It's not clear what type  
18 of cam follower doesn't have something like a pin in it.  
19 Somehow that cam follower has to be mounted to some other  
20 piece. A reading of Claim 6 that implies that "a cam follower  
21 including a pin" can be anything just puts us back into  
22 Claim 1, and then Claim 6 doesn't make any sense.

23 Furthermore -- and this goes to our issue on not  
24 being entitled to their priority date -- by trying to clarify  
25 that they have an infringement case here, they're saying that

1 Claims 6 and 16 are broad, because they're saying that the cam  
2 follower need not be a pin but can have a pin inside of it and  
3 can include lots of other things. That only goes to hurt  
4 their argument that Claims 6 and 16 are entitled to the  
5 provisional date, which provides no support for a concept of  
6 anything comprising a pin. The cam follower is a pin in the  
7 provisional.

8 That concludes Nightforce's position on the '907  
9 patent.

10 THE COURT: Thank you.

11 MR. BRUNETTE: Your Honor, I do have some brief  
12 rebuttal.

13 THE COURT: Yeah. Go for it.

14 MR. DAVIS: If you'll bear with me, as we try to do  
15 this, I'm going to have one of my colleagues help me pull up  
16 some slides that weren't in the original deck. I hope that  
17 goes well.

18 Your Honor, I want to take this a little bit out of  
19 both the order that Nightforce presented it and the original  
20 order. I'm going to start with infringement and then try to  
21 generally track through the order that they did, since  
22 infringement is fresh.

23 The first issue that we just talked about was  
24 actuator. And on the question of actuator, what Nightforce is  
25 leaving out of its presentation is the fact that Claim 1 and

1 Claim 10 are somewhat different, but neither of them require  
2 the actuator to extend out of the plane of the housing, and  
3 neither of them require the actuator to be directly connected  
4 to the housing.

5 So I put up Claim 1 earlier today, and that is on --

6 THE COURT: I think all that -- on Claim 1 I think I  
7 have -- I think it was a closer call on Claim 10.

8 MR. DAVIS: Right.

9 So the point I wanted to make on Claim 1 is note that  
10 Claim 1 is very different than Claim 10. The language of  
11 Claim 10 is in a slide that we have -- and, Elliott, if you  
12 could pull up -- there's a hidden slide in there that has the  
13 Claim 10 language in the actuator section. It would be right  
14 near 15.

15 As we start talking about that, the critical thing  
16 with respect to Claim 10 is that it requires that the focus  
17 control knob extend outwardly from the housing. Nothing about  
18 that claim language requires that every aspect of the focus  
19 control knob, every component of the focus control knob be  
20 outside the housing or outside the plane of the housing.  
21 Instead, it only requires that some portion of the knob extend  
22 outwardly from the housing.

23 The actuator is but one of many components of the  
24 focus control knob. You can see that that's right at the  
25 beginning of (c): "a manually adjustable focus control device

1 projecting outwardly from the exterior of the housing." The  
2 "projecting outwardly" language does not require it's located  
3 entirely outside, merely that some part of the device projects  
4 outwardly.

5 THE COURT: Hang on just a second.

6 So when it says that the "focus control device  
7 projecting outwardly from the exterior of the housing," and  
8 then it talks about the direction, and then it says "the focus  
9 control device including," and that then talks about the  
10 actuator, you're saying that does not mean that it needs to be  
11 outside of the housing?

12 MR. DAVIS: I would clarify that slightly, Your  
13 Honor. I would say that that does not mean that it needs to  
14 be entirely outside the housing.

15 THE COURT: Okay.

16 MR. DAVIS: There is no dispute that the focus  
17 control knob, the side turret knob on the Nightforce product,  
18 extends outwardly from the housing. The dispute is whether  
19 one of the internal components of that knob is located inside  
20 or outside the plane of the housing. That's just not required  
21 by the claim language. The claim language only requires that  
22 some part of the focus control device -- presumably the  
23 knob -- sticks out to the side of the scope.

24 The second part of that is mounting to the housing.  
25 So there is no mounting to the housing requirement in Claim 1

1 at all. The mounting to the housing requirement in Claim 10  
2 is located in Claim 10(c)(ii), which you can see here, which  
3 says that the "actuator slide is slidably mounted to the  
4 housing," but it does not say that the actuator slide has to  
5 be mounted directly to the housing. And certainly indirect  
6 mounting is entirely possible, and that's what has happened in  
7 the Nightforce product. It does slide along the housing and  
8 it is indirectly mounted to the housing, but it is not  
9 directly mounted to the housing. The presence of intervening  
10 parts in between the actuator and the housing is not a problem  
11 because of the open-ended claim language "comprising."

12 The second aspect of this is the word "pin." I want  
13 to focus first on what is the pin within the Nightforce  
14 product and the question of whether it's the pin or the  
15 bushing.

16 The *CCS Fitness* case is important here. In *CCS*  
17 *Fitness* there is a two-part mechanism. So there's a mechanism  
18 that's called out in the claim language. And I have forgotten  
19 what the exact word from *CCS* is, but that mechanism in the  
20 accused product is made up of two different parts joined  
21 together, and *CCS Fitness* is clear that that is perfectly  
22 okay. You can have two different structures that are joined  
23 together that satisfy a single claim limitation or two  
24 joined-together structures that satisfy two different claim  
25 limitations, even though they're integral with each other.

1           And under the general concept of patent law claim  
2 construction, those are all fine as long as the claim is not  
3 so clear that it precludes that. Nothing here about "cam  
4 follower that includes a pin" says that the cam follower can't  
5 be multiple parts, one of which is a pin and one of which here  
6 is a bushing.

7           Nightforce also argues that the pin is not a cam  
8 follower because -- and I think the argument they're trying to  
9 make -- I'm not a hundred percent sure I'm getting it right,  
10 but what I thought I just heard was that, well, could anything  
11 be a cam follower, if it doesn't look like it acts as a cam  
12 follower, because it has a pin in it?

13           But, of course, anything that has a pin in it is not  
14 necessarily a cam follower. Only something that is designed  
15 in such a way that it engages into a cam track can be a cam  
16 follower, into or onto. And so the fact that there is a cam  
17 follower here that is designed to fit into the cam track is  
18 what makes it a cam follower.

19           And what makes it infringe Claims 6 and 16 is the  
20 fact that there is a pin, that solid metal projection in the  
21 middle. The fact that it has a bushing around it and it's the  
22 bushing that actually touches the side wall of the cam track,  
23 not the pin, is irrelevant, because the two pieces together,  
24 joined together, as in *CCS Fitness*, function as a cam  
25 follower.

1           And when Mr. Byron calls out item No. 7, he's looking  
2     at figures where items 6 and 7 -- it's the same figures we  
3     looked at earlier, where items 6 and 7 in the Nightforce  
4     assembly instructions, where 6 is the bushing and 7 is the  
5     pin, get joined together to form a cam follower. That's what  
6     he's pointing out as the cam follower that includes a pin.  
7     There's no change in Leupold's position throughout this case.

8           Oh, and I have a slide of that if you want to see  
9     that quickly.

10           Elliott, could you pull up slide No. 10?

11           There it is. So this is a cut from paragraph 485 of  
12     Mr. Byron's opening report where he points this out, and you  
13     can see there is text talking about what is the pin and then  
14     he points to this figure. And in the figure, item 7 that he's  
15     pointing out is assembled with item 6 already inside of it.  
16     So it is a bushing surrounding a pin that is the cam follower  
17     he's talking about there. It's the same image we looked at  
18     earlier today in my earlier presentation.

19           THE COURT: Does that pin have a -- inside the  
20     bushing, is it a screw? Is that how it goes into that  
21     structure?

22           MR. BRUNETTE: Yes.

23           Let's see if we can --

24           THE COURT: That's okay. It's not essential to my  
25     decision. I was just curious.

1 MR. BRUNETTE: It's this (indicating). That's a  
2 picture of how it all goes together. So that part No. 6, the  
3 right side of it, behind the flange, is threaded, so it is in  
4 that sense a screw. And those threads go into the arm that  
5 sticks out in the scope. And then the part on the left side  
6 of the flange is the pin.

7 THE COURT: So that bushing that fits over the top of  
8 that has a slot so that it can expand and then contract after  
9 it snaps over the top.

10 MR. BRUNETTE: I think the slot that's in the middle  
11 of 6 is actually so that you can screw into the arm, as if it  
12 was a screw.

13 THE COURT: I'm guessing that No. 7 has a slot that  
14 runs down its side in order to fit over the top of that.

15 MR. BRUNETTE: That's possible. Yeah, I'm not  
16 certain if it snaps around the side or if it's somewhat  
17 elastic.

18 THE COURT: Okay. Thank you.

19 MR. BRUNETTE: Changing next, Your Honor, to the  
20 issue of date of invention, I want to start with what we  
21 didn't hear from Nightforce; and what we didn't hear from  
22 Nightforce was anything about the rule of reason. Instead of  
23 talking about the rule of reason standard, Nightforce wants to  
24 make up its own standard and assert that specific  
25 corroboration of every aspect of testing in particular and



1 reduction to practice in general is required.

2 Notably, when Nightforce talked about that, it did  
3 not cite to authority, because the controlling authority is  
4 that there is a rule of reason standard. And the overall  
5 question is not whether every aspect of reduction to practice  
6 is proven by specific corroborating independent evidence, but  
7 whether the overall story is sufficiently corroborated that it  
8 is believable to a reasonable juror in light of the  
9 corroboration requirement.

10 And of particular importance here is the  
11 burden-shifting that I mentioned in my opening argument from  
12 the *Mahurkar* case at 79 F.3d at 1578. All Leupold has to come  
13 forward with is enough evidence that, drawing all inferences  
14 in Leupold's favor with respect to Nightforce's motion, a  
15 rational juror could find that Mr. Otteman invented earlier  
16 than 1998. Once that standard is met, then the burden shifts  
17 back to Nightforce to disprove that and persuade a jury that  
18 he did not do so.

19 So starting with the testing issue, because I think  
20 Nightforce spent more of its time on that and I want to dig  
21 into that first, and starting first with the evidence that  
22 there was testing -- Elliott, if you could pull up slide  
23 No. 30 -- Nightforce takes the position that there is no  
24 evidence that Mr. Otteman actually put together the scope and  
25 tested it as a prototype. And that's how we get into this

1 whole debate about the supplemental Byron declaration and  
2 whether testing is required or not. The Court doesn't even  
3 need to go down that rabbit hole, because there is sufficient  
4 evidence that testing occurred.

5 So here are some quotes from Mr. Landvatter's  
6 testimony (reading): "Do you ever recall discussing any  
7 testing Mr. Otteman did on a prototype you generated?

8 "Just that our part worked sufficiently.

9 "Okay. So going back again to paragraph 12 of  
10 Mr. Otteman's declaration, is it your recollection that  
11 Mr. Otteman communicated to you that the parts you made for  
12 him related to the spiral cam worked?

13 "Yes.

14 "And would he have communicated that to you shortly  
15 after you delivered the parts to him?

16 "He would have tested them right when I was there.

17 "Okay.

18 "And the reason I would have gone" -- "and that's the  
19 reason I would have gone down to make sure the parts were  
20 working correctly."

21 So Mr. Otteman told Mr. Landvatter that he tested the  
22 parts and they worked at approximately the same time that the  
23 prototype was delivered.

24 Mr. Otteman also testified that he put together the  
25 entire scope and it worked. Indeed, Nightforce cites that as

1 evidence that he thought testing was required. But that's not  
2 what Mr. Otteman said. He didn't say he was required to test  
3 it. He said he did. This evidence corroborates Mr. Otteman's  
4 own testimony and is sufficient to find testing.

5 Now, Nightforce wants to talk about their idea that  
6 there are four different categories of testing, and there is a  
7 case that calls out a bunch of different examples of what  
8 might be sufficient testing under the circumstances. But  
9 Nightforce's assertion of what constitutes sufficient testing  
10 in individual cases -- the idea that no testing is required  
11 only where the invention is simple and the field is  
12 predictable versus severe real world testing is required where  
13 severe real world conditions like vibration are going to be  
14 expected -- is something that Nightforce made up. There is no  
15 general Category 4 test for testing. There is, instead, a  
16 rule of reason. The standard is whether the testing was  
17 sufficient under the circumstances.

18 And what we really know is that, in fact, while the  
19 claims of this patent require both a spiral cam mechanism and  
20 various parts of the riflescope around them, most of the parts  
21 that were used were already tested and commercially viable.

22 Mr. Landvatter -- excuse me. Mr. Otteman testified  
23 that when he made his prototype of the spiral cam scope -- and  
24 this is on page 36 of his deposition transcript and in even  
25 more detail at 80 and 81 -- that he worked from an existing

1 commercial Leupold scope. And that scope, as he testified,  
2 would have already been subject to testing. The only thing  
3 he changed out was he changed out an existing orbital pin  
4 design for the side parallax focus for the specific spiral cam  
5 parts.

6 Well, switching out one kind of control for another  
7 is very different from developing an entirely new riflescope  
8 from scratch.

9 The analogy that comes to mind for me here is if  
10 someone invented a new and better shape for a steering wheel  
11 for an automobile and they could simply take out -- do a  
12 little mechanical re-jiggering and take out the existing  
13 steering wheel and pop in their new prototype steering wheel,  
14 they would not have to independently test whether the engine  
15 still works or whether the taillight still works or whether  
16 the car hangs together over bumps.

17 Those are all important things in designing a car,  
18 but they're not part of testing that steering wheel prototype,  
19 even if the patent on the steering wheel prototype talks about  
20 the car and the wheel and the engine, because they're all  
21 important to how the new steering wheel works better than the  
22 old design. They're not an important part of testing whether  
23 that prototype, under a rule of reason standard, works for its  
24 intended purpose.

25 THE COURT: I think that's a bad example, because if

1 someone is putting a steering wheel on a car, I'm going to  
2 expect there's going to be tons and tons and tons of testing  
3 of that steering wheel.

4 MR. BRUNETTE: Oh, certainly there will be extensive  
5 testing before the product is commercialized.

6 THE COURT: Oh, even after you put it on for the  
7 first time, if you're putting it on a car, my guess is -- just  
8 common sense tells me you don't just put it on a car and not  
9 test it a lot to make sure that everything works.

10 Your point is made. I just don't know that your  
11 example is the best one to choose.

12 MR. BRUNETTE: I see your point, Your Honor.

13 I think the overall point is that the scope is  
14 already vetted. And with the addition of these parts, the  
15 parts were tested, the parts were assembled into a prototype,  
16 and the prototype worked for its intended purpose. That  
17 didn't require impact testing to know that the spiral cam  
18 mechanism would move the focus control knob.

19 So that brings me to the separate issue of, well,  
20 even if there wasn't evidence of testing -- actually, one more  
21 thing I want to go back and do there. As to the four  
22 categories that Nightforce came up with, sort of moving from  
23 no testing on the left-hand side to extensive testing on the  
24 right-hand side, they talk about severe real world conditions  
25 and vibration being one of the criteria that if met, if that's

1 something you expect the invention to encounter in real life,  
2 then you have to do more testing.

3 Well, that's completely inconsistent with the Federal  
4 Circuit's decision in *Slip Track*, because *Slip Track* is a  
5 mounting system that's supposed to withstand earthquakes, and  
6 yet the testing that was done was simply making the prototype  
7 and confirming its size and confirming the way that it fits on  
8 wallboard. It did not require actually putting it on  
9 wallboard and shaking it on a shake table to simulate an  
10 earthquake or putting it somewhere in an earthquake-prone area  
11 to know that it was going to work in an earthquake.

12 And in just the same way, even though riflescopes are  
13 subject to abuse and even though in selecting what kind of  
14 mechanism to design for a riflescope, keeping that abuse in  
15 mind is important, which is all Mr. Byron has said about the  
16 obviousness points that Nightforce is trying to turn around  
17 and make about testing. The fact is in order to know that  
18 this focus control knob works, you don't need to impact test  
19 it and weather test it, particularly when you're attaching it  
20 to a scope that already works.

21 Leupold also argues that Mr. Byron's declaration is  
22 late. And this is an argument about the summary judgment  
23 burdens and what happens.

24 Just to be clear, on October -- is it 5th or 10th?  
25 At the beginning of October Leupold filed a summary judgment

1 motion which was a *Celotex*-type motion, merely pointing out  
2 that Nightforce had not met its burden on various issues.  
3 Then Nightforce filed its motion; and in responding to  
4 Nightforce's motion, Leupold entirely properly put in the  
5 evidence that it had to prove up its claims.

6 That evidence was not required earlier. And the  
7 failure to anticipate the argument that Nightforce was going  
8 to make and put that evidence in in the first place in our  
9 motion is certainly not a basis to grant Nightforce's motion.

10 In any event, untimely expert reports are subject to  
11 being stricken only when there is prejudice, and there is no  
12 prejudice here. Nightforce says, "Well, there is prejudice  
13 because we win otherwise." But that's always true. If it's  
14 important, that's always true.

15 It's some prejudice beyond, "Hey, your evidence is  
16 good for you" that makes the lateness the prejudice. And that  
17 is not sufficient. There has to be something that they would  
18 have done differently that they're not now able to do to  
19 constitute such prejudice. And given that discovery is still  
20 open, there's nothing that they couldn't do, particularly  
21 since they had an opportunity to reply.

22 In addition, Mr. Byron's testimony that no testing is  
23 required is not inconsistent with his testimony that it is  
24 really important to understand recoil when you're designing  
25 systems for riflescopes. This is both because Mr. Otteman

1 started from a platform that was already properly tested and  
2 in a working commercial scope and because the point that  
3 Mr. Byron was making is you can't just go out to other fields.

4 This is really what Mr. Byron was saying. You can't  
5 go out to a video camera and effectively just put them on a --

6 THE COURT REPORTER: Counsel, I really have to have  
7 you slow down.

8 MR. BRUNETTE: I'll try to stay closer to the mic as  
9 well.

10 What Mr. Byron was saying in the testimony that they  
11 cite is that you can't simply go out to a video camera and  
12 stick it on a riflescope and expect it to work. He was not  
13 saying that in order to know whether every individual part of  
14 a riflescope is going to work, if changed slightly, that you  
15 would need to redo all of that testing.

16 Those are very different ideas. And the fact that he  
17 said one does not make -- the fact that he took different  
18 positions on those very different questions is not in any way  
19 inconsistent, nor is there any testimony from any other expert  
20 taking a different position.

21 Finally, Nightforce argues that Mr. Otteman admitted  
22 that testing was required, but that is not what the testimony  
23 said. That is simply a mischaracterization of the testimony.  
24 In fact, Mr. Otteman's transcript, page 36, lines 12 to 19 --  
25 it's docket 92-1 -- he says -- he confirms that the prototype



1 would have been tested to see if it worked as intended. But  
2 he did not say that testing was required, merely that it  
3 happened. It's not an admission that testing was necessary to  
4 know if it worked.

5 Moving over to the broader issue of corroboration of  
6 reduction to practice, Nightforce ignores entirely the  
7 documents that are perhaps most telling, which is those 1995  
8 drawings, which are definitively dated and were preserved on a  
9 1996 CD with no change to their content since 1995. So we  
10 know that whenever they were sent to Mr. Landvatter, they were  
11 the same as when they were created in 1995. Mr. Landvatter  
12 tells us that he made the prototypes and that he believes they  
13 were in 1995 or 1996.

14 Now, in trying to rebut this testimony, Nightforce  
15 throws around the word "recants." But Mr. Landvatter and  
16 Mr. Otteman did not recant any of their testimony. They did  
17 not get up on the stand and say, "Oh, never mind. Everything  
18 I said was wrong. I take it back." That's not true.

19 Nightforce thinks that it got some admissions that it  
20 could use on cross-examination to undermine the credibility of  
21 their testimony. That may be right and it may be wrong. But  
22 that is what we have juries for. And so, at most, that is a  
23 reason that there's a fact dispute about what really happened  
24 and about the details. It is not a basis to grant summary  
25 judgment in Nightforce's favor, that there is no

1     corroboration. A jury, drawing all inferences in Leupold's  
2     favor, could believe the testimony that Mr. Otteman and  
3     Mr. Landvatter gave.

4             And, in particular, if you actually look at the  
5     statements in Nightforce's brief -- and there are many of them  
6     and I won't go through them all here. But if you look at the  
7     statements in Nightforce's brief and then go back and read the  
8     transcripts, including the questions they ask and the  
9     questions around them, it will be very clear that Nightforce  
10    is very optimistic about the effect of the admissions that it  
11    feels it got on cross-examination. They are not so clear that  
12    that is necessarily the only conclusion the jury could reach  
13    from the testimony taken on cross.

14            An example of this is the "gotcha" argument that  
15    Nightforce makes with respect to the shape of the spiral cam.  
16    So Nightforce -- and this is on -- in Mr. Landvatter's  
17    transcript I believe it's on page 68, but it's cited in  
18    Nightforce's briefing. And they make this argument that  
19    Mr. Landvatter misidentified which shape of the spiral cam,  
20    and they put in their slide deck the two different spiral  
21    cams, one of which goes around slightly more than 360 degrees  
22    and one of which is slightly less.

23            If you actually read through the questioning that's  
24    in the record, Mr. Landvatter is asked, "Would you recognize  
25    those if you -- which one is which, which one was the first

1 one that you made out of the various different spiral cam  
2 shapes that you make?" And he said, no, wouldn't be able to  
3 do it.

4 And then they asked him, "Well, there's one that's  
5 more than 360 degrees." And ultimately all he says is that  
6 that's consistent with what he made, it might have been.

7 He's certainly not saying, "Yes, I" -- he's not  
8 presented with both of them. And upon hearing about the shape  
9 of one of them, he says, "That's consistent with what I made,"  
10 not, "Yeah, that's definitely the first one that I made."

11 Nightforce is -- their conclusions about the effect  
12 of the testimony that they're getting and the extent of that  
13 testimony are not entirely consistent with the actual  
14 underlying testimony. So I encourage the Court to read it  
15 closely in going through those.

16 The next issue I'll turn to is the provisional  
17 priority. So starting first with Claims 6 and 16, Nightforce  
18 has not cited to any case in which an unclaimed element of the  
19 claim has to -- in which any Court has held that an unclaimed  
20 element of the claim must be disclosed in either the  
21 specification or in the provisional. Of course that cannot be  
22 the law.

23 If Mr. Otteman's patent were written so that only the  
24 asserted elements and no -- the claimed elements and nothing  
25 more could be part of the invention -- in other words, if it

1 was closed-ended claiming, then if Nightforce simply tacked  
2 lens caps, which are a non-claimed element, onto the end of  
3 its scopes, they would be non-infringing because it would  
4 include elements that are not permitted in the claimed design.

5 But, of course, that's not how patent law work.  
6 Everyone writes their claims open ended so that the infringer  
7 can't just add one more feature and make them infringing. And  
8 the fact that -- the patentee cannot be expected to imagine  
9 every feature that could possibly be added to its scopes and  
10 include every one of those -- or any other patent -- and  
11 include every one of those in the provisional and in the  
12 specification, because while they might be able to imagine  
13 that someone would put lens caps on a riflescope, it's  
14 possible that someone could put a competitor's logo or a new  
15 competitor's logo on the outside or, in a joke, might attach a  
16 pair of fuzzy dice to a riflescope for luck.

17 None of those things have to be disclosed in the  
18 specification. That is not what the written description  
19 requirement requires. And the *D Three* case that Nightforce is  
20 so eager to talk about is not different. Each of the claims  
21 at issue requires a washer. None of the claims of the '907  
22 patent requires a bushing. Instead, they require a pin. And  
23 the provisional discloses a cam follower that includes a pin.  
24 The provisional need not disclose every other thing in  
25 addition to a pin that could possibly be part of a cam

1 follower.

2           There simply is no Federal Circuit or any other  
3 authority to the contrary. And, indeed, the *Lochner* case that  
4 we cited in my opening presentation expressly says the  
5 opposite: Unclaimed elements do not need to be disclosed.

6           Turning, then, to all of the other claims besides 6  
7 and 16, provisional priority is a one-sided battle of the  
8 experts. In other words, the ultimate question is one of  
9 expert proof. How would a person of skill in the art  
10 understand what Mr. Otteman had or had not disclosed in his  
11 patent?

12           Now, Nightforce tries to say, and said standing here  
13 a relatively short time ago, that the disclosure requirement  
14 is one of, quote, express disclosure. That is not an accurate  
15 statement of the law. A provisional or a specification need  
16 not expressly disclose everything that falls within the scope  
17 of the claims. Rather, whether the disclosure is sufficient  
18 is judged from the perspective of a person skilled in the art  
19 and whether a person of skill in the art would understand that  
20 the patentee possessed what is claimed.

21           That is different from an express disclosure  
22 requirement. It is narrower than the standard for  
23 obviousness, but it is broader than express disclosure.  
24 Mr. Byron's testimony is not framed in terms of obviousness.  
25 It is framed in terms of the correct legal standard: what a

1 person of skill in the art would understand.

2 Now, counsel for Nightforce disagreed with  
3 Mr. Byron's assessment of what a person of skill in the art  
4 would understand. But we don't get to resolve a disagreement  
5 between Nightforce's counsel and an expert witness by granting  
6 summary judgment. That's what trials are for, if there are  
7 two experts that reach different conclusions.

8 Here the only expert is Mr. Byron because the  
9 opposing expert who offers an opposing viewpoint on this issue  
10 is not really a person of skill in the art in the field. Now,  
11 Nightforce says, well, really both experts are the same in  
12 terms of their skill, but that's actually not accurate. If  
13 you dig into it, the only thing that Mr. Brandenburg has done  
14 in the field is to design a single part for a friend, for the  
15 handhold on one gun, and to make some drawings of another gun  
16 in a computer.

17 That does not make him any different than the expert  
18 in *Sport Dimension* who had come up with some things that  
19 floated and had designed some products that floated and would  
20 have been qualified to testify whether the personal flotation  
21 device would float, but not whether it would work as a  
22 personal flotation device for what a person of skill in the  
23 art in the field of designing personal floatation devices  
24 would have known.

25 So Mr. Brandenburg is not a person of skill of the

1 relevant art; Mr. Byron is. And, therefore, Leupold's motion  
2 should be granted on this and Nightforce's denied. At a  
3 minimum, there is at least a battle of the experts; and  
4 Nightforce cannot win summary judgment on this issue.

5 Now, a couple of other things. The Court asked, when  
6 counsel for Nightforce was up here -- I believe the question  
7 was "Do I have to decide what 'groove' means to decide this  
8 dispute?"

9 And Leupold's answer to that is that the question of  
10 what the disclosure of a groove in the provisional means is  
11 not a question of law for the Court; it is a question of fact.  
12 Because the question is not, as a matter of law, what does  
13 "groove" mean? The question is what would a person of skill  
14 in the art have understood a groove to disclose? And the  
15 answer to that is found in the expert testimony, and in  
16 particular the expert testimony given by Mr. Byron.

17 Turning next to the issues of equitable estoppel and  
18 the certificate of correction, I'm going to take those out of  
19 order because Nightforce's discussion of equitable estoppel  
20 assumes that Nightforce is going to win on the certificate of  
21 correction issue, so I think it makes more sense to take them  
22 in the opposite order.

23 THE COURT: Can we take a break right at this time?  
24 We're getting onto a new topic.

25 I need a cup of coffee to recharge my brain, and then

1 I'll be better ready to listen to you for the next couple of  
2 hours. All right?

3 So let's take 15 minutes. We'll be back.

4 (A recess is then taken.)

5 MR. BRUNETTE: Your Honor, I think where we were, we  
6 were just finished with provisional priority and moving on to  
7 certificate of correction.

8 So on this issue, the key issue to look at is the  
9 *Carotek* case, discussed in my opening remarks. And an  
10 argument that we heard extensively from Nightforce is, well,  
11 this case is different. And Nightforce argues that this case  
12 is different because the error was Leupold's fault, that  
13 Leupold was the one who purportedly made a mistake in putting  
14 the claim of priority in an inventor declaration rather than  
15 in the application itself, and Leupold should have come clean  
16 on that at the time and failed to do so. That's their  
17 argument for why the 2003 certificate of correction is not  
18 effective.

19 That is the exact same argument that was made and  
20 that was only half successful in *Carotek*. So in *Carotek* they  
21 had exactly the same debate about exactly the same question.  
22 And the Court in *Carotek* ultimately agreed with the defendant  
23 that the error was the patentee's fault, but did not agree  
24 that that error or the fact that the error was the patentee's  
25 fault or the fact that the certificate of correction fixing



1 the error only put the claim of priority on the face of the  
2 patent and not in the first sentence of the specification,  
3 none of those things were sufficient to make the patent  
4 invalid on its face prior -- at the time.

5 So in *Carotek* there is no second certificate of  
6 correction that fixes the -- that fixes putting the priority  
7 claim into the first sentence of the specification in addition  
8 to on the face of the patent because the *Carotek* Court says,  
9 "That's okay. The regulations would require that, but the  
10 Patent Office only would have issued this certificate of  
11 correction if it thought that what you did was good enough."

12 And, in fact, the Federal Circuit tells us that the  
13 point here is the public notice function and "Looking at the  
14 face of the patent, this priority claim is really clear. It's  
15 maybe clearer here than if you had just complied with the  
16 statute, and that's good enough."

17 The point is the *Carotek* Court, one, did not care  
18 whose fault it was. The *Carotek* Court made a finding on that  
19 but it didn't matter to the outcome, and the same is true  
20 here.

21 And, two, the *Carotek* Court and the *Prism* Court both  
22 say that putting a priority claim via certificate of  
23 correction on the face of the patent is sufficient to make the  
24 patent valid because the PTO, in issuing the certificate, is  
25 exercising its discretion and holding that that is sufficient.

1           In contrast, there is no case holding that a  
2     certificate of correction that puts the priority claim only on  
3     the face of the patent is not sufficient. There's no case  
4     going the other way. The only case that Nightforce cites on  
5     this issue is the *Worlds* case, but that case is entirely  
6     factually different.

7           There the certificate of correction issues only after  
8     this issue was raised on summary judgment and is not effective  
9     not because it puts the claim of priority in the wrong  
10    place -- there was no claim of priority -- and then an  
11    untimely certificate of correction puts it in the right place.  
12    Here, the 2003 certificate of correction is timely and the  
13    place where it puts the provisional claim is good enough,  
14    according to the *Carotek* Court and the *Prism* Court.

15          This is important both to the certificate of  
16    correction issue, but also because Nightforce tries to take  
17    the certificate of correction issue and make it its new basis  
18    for its equitable estoppel argument because its old equitable  
19    estoppel argument wasn't working.

20          So turning to -- one last thing on certificate of  
21    correction. There is no case contrary to *Carotek*, holding  
22    that going to the PTO and seeking a certificate, saying that  
23    you think the error was the PTO's error in not having a  
24    priority claim at all, makes the resulting certificate  
25    invalid. Nightforce is making that argument, but they cite no

1 authority.

2 And *Carotek* is, again, contrary authority, where the  
3 patentee all along took the position that the error was the  
4 PTO's, the Court finds that the error was really the  
5 patentee's, but that doesn't matter. The certificate of  
6 correction issued under the assumption that it was the Patent  
7 and Trademark Office's error is still sufficient.

8 Now, turning to equitable estoppel, first on the  
9 issue of deception, Nightforce's argument seems to turn on  
10 three different kinds of deceptive conduct. They restate them  
11 in different ways to try to make more bullets on their slides,  
12 but they all come down to either silence, the absence of the  
13 patent marking, or certificates of correction issues.

14 So going through those three, first as to silence,  
15 the *Hemstreet* case from the Federal Circuit is clear that  
16 where the ball is in the patentee's court, silence is not  
17 going to be enough, particularly where the opening  
18 communications are about licensing, not an express threat to  
19 sue. That's exactly the facts we have here.

20 Nightforce talks about the *Akeso* case out of the  
21 Central District of California, but the reasoning of that case  
22 suffers from a fundamental problem in that much like many of  
23 Nightforce's arguments here, it is merging the doctrine of  
24 laches into the doctrine of equitable estoppel.

25 So *Akeso* draws on this idea from back when there was

1 a laches defense that was effective, that there is a six-year  
2 presumption of laches. All of that is gone, but Akeso  
3 resurrects that six-year presumption of laches and sticks it  
4 into the "silence" portion of equitable estoppel, saying that  
5 once you go over six years, there's sort of a presumption that  
6 you must be doing something. There is no support in Federal  
7 Circuit law for that reasoning on equitable estoppel. It all  
8 comes out of laches, and that's not appropriate. Laches is  
9 gone. The Supreme Court struck it down as a defense to patent  
10 damages actions.

11 Second, patent marking. So Nightforce makes an  
12 argument for the first time in either its opposition or its  
13 reply brief that, well, the deceptive conduct here is that  
14 Leupold didn't go out and mark its patent numbers on its  
15 products. The whole reason that marking comes up on this case  
16 is because they asked a series of discovery question about  
17 marking, because it's relevant to damages limitations. But  
18 there are two problems.

19 One, there is no evidence in the record that  
20 Nightforce knew that Leupold was not marking at the relevant  
21 time. They're drawing on interrogatory responses during this  
22 litigation about whether marking occurred. There is no  
23 showing that Nightforce knew or relied upon a lack of marking  
24 at the relevant time.

25 Second, even if Nightforce had known about the

1 relevant -- the lack of marking, there is a statutory penalty  
2 for failure to mark. A patentee can make a choice not to  
3 mark; and the penalty that it takes is the penalty provided by  
4 statute, which is a limitation on its damages. It would be  
5 inappropriate to take that choice and turn it around and use  
6 it to entirely cut off a patentee's damages.

7 In fact, this would be like exactly the problem that  
8 happened under the doctrine of laches. There is a statutory  
9 limitation on damages periods, and therefore delay causes a  
10 patentee to suffer the statutory consequence -- limitation on  
11 damages -- not the broader consequence of barring its claim  
12 entirely.

13 Third, the certificate of correction issue.  
14 Nightforce's argument under equitable estoppel assumes that  
15 Nightforce wins on the certificate of correction issue; and,  
16 therefore, that from 2003 until 2016 the '907 patent was  
17 invalid on its face. That is wrong for all the reasons I just  
18 discussed. For all the reasons set out in *Carotek*, it is  
19 entirely appropriate that Leupold handled the situation  
20 exactly as it did. Leupold corrected any error in the '907  
21 patent in 2003, and it has been valid at all times since.

22 Now, Nightforce makes the further argument that it  
23 purportedly gave some kind of warning to Leupold in 2006 that  
24 its patent was invalid and that Leupold needed to deal with  
25 this. And then Nightforce draws out of that an argument that

1 Leupold, having that warning, sat on its rights for 10 years  
2 and did nothing.

3 That sounds compelling, except that it is not  
4 consistent with the factual record. Nightforce did not say in  
5 2006, "Guys, we've looked at your 2003 certificate of  
6 correction and we think it puts the claim of priority in the  
7 wrong place." Instead, what Nightforce said in 2006 is "Your  
8 patent, on its face, does not include a claim of priority at  
9 all; and, therefore, we think that things that are in between  
10 1999 and 2000 are prior art and you have a real problem."

11 Leupold wrote back and said, "Hey, guys, there's a  
12 2003 certificate of correction. So that's not shown on the  
13 face of the patent, but we really do -- we've corrected that,  
14 and we are claiming priority back to the 1999 provisional."

15 What did Nightforce say in response? Absolutely  
16 nothing. That's the e-mail that Nightforce chose as the time  
17 to let the conversation drop in 2006 and refused to respond  
18 even when Leupold's counsel called and left a message with the  
19 secretary, asking for a response. No response.

20 So Nightforce can't stand up here and say Leupold was  
21 warned. Instead, the only evidence of when Leupold found out  
22 about the argument Nightforce is now making, that the 2003  
23 certificate of correction purportedly put the claim of  
24 priority in the wrong place, is in 2016. And we know that  
25 when Leupold got notice that Nightforce was making that

1 argument, Leupold went and got another certificate of  
2 correction just as extra insurance, just to make sure.

3 And being aware of cases like *Worlds* that say that  
4 it's critical to have such a certificate of correction in  
5 place before filing suit, Leupold decided to wait just a few  
6 months more before filing suit on the '907 patent, as those  
7 cases instruct.

8 Nothing about this was in any way deceptive. And,  
9 indeed, that's exactly what Klaus Johnson said. There was no  
10 carve-out in the designation of Klaus Johnson as Nightforce's  
11 designee, saying, "He's designated for everything except this  
12 defense." He was designated for this defense.

13 And there was nothing tricky about the questions he  
14 was asked. He was asked very clearly, "Was there anything  
15 about Leupold's conduct with respect to patents that you  
16 thought was misleading?" He was given every opportunity, if  
17 he thought that Leupold had done something misleading, to say  
18 so. And, indeed, he's never come in and changed his testimony  
19 on that. There's no correcting declaration saying, "Oh, I was  
20 mistaken. I was thinking about the Windauer patents." That's  
21 simply not in the record.

22 But, in any event, even if there had been deceptive  
23 conduct, Nightforce cannot tie any reliance both to that  
24 deceptive conduct and to resulting prejudice, because that's  
25 the kind of nexus that it needs. It needs to have something

1 that was misleading; reliance, not just in general but on the  
2 thing that was misleading; and resulting prejudice, not just  
3 in general but because of its reliance on the misleading  
4 thing.

5 It is absolutely clear from the record what Ray  
6 Dennis was relying on, and that is his conclusion that the  
7 '907 patent would ultimately be found invalid. And it is also  
8 absolutely clear that nothing Leupold said in 2007, 2008, or  
9 any time between then and 2016 would have caused Ray Dennis to  
10 tell Nightforce -- and he was the ultimate decision-maker --  
11 to change its products.

12 In fact, Mr. Dennis was so clear about this that he  
13 even said so in his summary judgment declaration in this case,  
14 and that's the slide we have up here. This is paragraph 17 of  
15 Mr. Dennis's summary judgment declaration, where he says the  
16 only circumstance under which he would have changed his  
17 product. And that was if Leupold had "brought suit in 2006 or  
18 shortly thereafter" -- and this is the critical part, not only  
19 that Leupold had to sue -- "and prevailed or showed signs of  
20 prevailing."

21 So even if Leupold had very clearly told Nightforce  
22 in 2006, "We're going to sue you later, just so you know. Do  
23 what you need to do," even if Leupold had actually sued  
24 Nightforce in 2006, even if Leupold had proceeded with that  
25 lawsuit but not yet showed signs of prevailing, under all of



1 those circumstances, Nightforce would not have changed its  
2 products.

3 The prejudice that Nightforce is claiming is that it  
4 made an investment in its products after it was purportedly  
5 deceived. That prejudice is not caused by any reliance on any  
6 misleading conduct. That is the cost of Mr. Dennis's business  
7 judgment, that he was really sure he was going to win on the  
8 '907 patent. So maybe it turns out that he's right and maybe  
9 it turns out that he's wrong, but he doesn't get to use the  
10 fact that he made that gamble to preclude Leupold from  
11 bringing its claim.

12 Finally, on the issue of prejudice, Nightforce makes  
13 an argument that Schmidt & Bender purportedly destroyed some  
14 documents at some point. But there's nothing in the record  
15 about that. That's merely argument that came out during the  
16 argument today. There's no evidence on that. So that can't  
17 be the prejudice. And, in any event, it's almost impossible  
18 to imagine how that relates in any way to any reliance that  
19 Mr. Dennis had.

20 Once again, what Nightforce is really doing is  
21 trying to turn equitable estoppel back into laches. If  
22 document destruction were a kind of prejudice, it would be a  
23 prejudice that results not from reliance, but from delay.  
24 And delay alone is insufficient to establish equitable  
25 estoppel.

1           Proceeding briefly to the two remaining arguments,  
2           one of them is about Altenheiner, the binoculars. Nightforce  
3           makes the argument that Mr. -- that binoculars are a kind of  
4           telescopic rifle sight, citing some testimony from Mr. Byron.  
5           Nightforce cites that testimony entirely out of context.

6           What Mr. Byron was talking about was an aiming device  
7           for counter-sniper fire. So this is a product that he  
8           developed for the military that was ultimately never fielded,  
9           but it uses binocular machine vision. So, in other words,  
10          there are multiple cameras mounted on posts some distance  
11          apart from each other, and they see the flash when a sniper's  
12          muzzle goes off. And by triangulating that flash between  
13          cameras at different points -- in other words, with binocular  
14          machine vision -- it can pinpoint automatically, via computer,  
15          without human intervention, both which direction the sniper  
16          round is coming from and how far away it is, using  
17          trigonometry, based on having the binoculars some distance  
18          apart.

19          And the way the system works is it then sounds an  
20          alarm so that people near where the shot is coming in have a  
21          second or two to duck, because in long-range sniper fire there  
22          actually is some period of time between when the muzzle flash  
23          happens and when the bullet hits, and it automatically directs  
24          counter-sniper fire from some kind of automated battery that  
25          sends a mortar or an artillery round or something of that kind

1 back.

2           These binoculars are not telescopic rifle sights.  
3 They are an optical aiming system in the sense that they  
4 assist in aiming another device, but it's via a computer and  
5 entirely different. Nothing about that experience suggests  
6 that the ordinary field binoculars described in Altenheiner  
7 are a telescopic rifle sight. They plainly are not.

8           And, in any event, the question on anticipation is  
9 not what Mr. Byron thinks about the binoculars. It is what's  
10 disclosed in the Altenheiner reference on its face. And on  
11 the four corners of the Altenheiner reference, there is  
12 nothing in there that suggests a firearm or a rifle of any  
13 kind. Altenheiner, therefore, cannot be anticipating.

14           As to obviousness, it's a repeat of the same  
15 discussion about whether Mr. Brandenburg is or is not a  
16 qualified expert, which is ripe for decision on the briefing.

17           And I do want to pause for just a moment to go back.  
18 Nightforce made several mentions to Leupold's opening brief as  
19 being cursory in dealing with the issues -- and there are many  
20 of them -- only in 35 pages. And I just wanted to make sure  
21 the Court is clear -- I think we've said this in a footnote in  
22 our brief -- as to why we only filed one motion as opposed to  
23 multiple motions as Nightforce did, and that's because we were  
24 warned in a prior case to keep to one.

25           THE COURT: Because I said so.

1 MR. BRUNETTE: That is precisely why, Your Honor.  
2 We listened.

3 Finally, Your Honor, getting to the Schmidt & Bender  
4 scope, the critical issue here, one of them is the hearsay  
5 documents. There is absolutely nothing to make Hans Bender's  
6 statements about what he purportedly thought Schmidt & Bender  
7 had done in 1997 as of 2004 or 2006 an admission of Leupold.

8 Indeed, the only question that Leupold's designee,  
9 Mr. Worth, was asked is whether he thought that Mr. Bender was  
10 a trustworthy person; and he said, in general, yes. But  
11 there's no showing that Mr. Worth knew anything about these  
12 e-mails or that Leupold had any reason to know whether  
13 anything in these e-mails was or was not true. That simply is  
14 not an appropriate basis for an 801 hearsay exception nor has  
15 there been any briefing on this issue. Nightforce could have  
16 taken the opportunity to brief this issue and has not done  
17 that.

18 Nightforce also makes the argument, well, you can tie  
19 together the advertisements that talk about a scope with a  
20 third turret on it with the photos of the teardown, whenever  
21 that happened, to reach the conclusion that whatever scope was  
22 in there must be the same scope because it has the same name.  
23 And they say, well, it's very expressly called out as the same  
24 name.

25 I just want to make sure it's clear in the record

1 what that name is. The scope that was torn down is a Long  
2 Range scope. That's the name that was called out. And that  
3 does not seem to be sufficiently specific to say, well, the  
4 Long Range scope that was advertised in 1997 and the Long  
5 Range scope that was torn down at some unknown later date --  
6 we don't know when -- must have been the same because they  
7 both say "Long Range" on them and they happen to be the same  
8 objective size. There is simply no evidence as to what, if  
9 anything, Schmidt & Bender was actually selling in the United  
10 States in 1997.

11 That's all I have at this point, Your Honor.

12 THE COURT: Thank you.

13 Anything else?

14 MR. CASIMIR: Just a brief response on a few of those  
15 points.

16 THE COURT: Sure.

17 MR. CASIMIR: And I'll just, since it's fresh in our  
18 minds, on the point of the Long Range scope, "Long Range" was  
19 a Schmidt & Bender brand name. It wasn't referring to a scope  
20 that was useful at long ranges. It was also that, but it's a  
21 brand name.

22 And then also just a quick note on the hundreds of  
23 issues in one motion, the issue isn't so much that there was  
24 one motion. The issue is they moved for every -- they moved  
25 on every issue in the case in that one motion, including for

1 validity and infringement on claims they've since withdrawn.  
2 The issue is they -- the overwhelming onslaught of every  
3 issue, many of which are not possibly suitable for summary  
4 judgment.

5 But let's get into some of the specifics here. So  
6 let's start, very quickly, on the infringement issue.

7 THE COURT: Can I interrupt you for a second?

8 MR. CASIMIR: Sure.

9 THE COURT: On the first point you made regarding  
10 Long Range, is that something that is ascertainable from the  
11 evidence that's before this Court?

12 MR. CASIMIR: It is. The catalog from 1997 lists the  
13 two brand name scopes that added the side parallax. One was  
14 called a Varmint. One was called the Long Range.

15 THE COURT: Okay. Thank you.

16 MR. CASIMIR: All right. Very quickly on the  
17 infringement, the key issue here is we have an undeveloped  
18 record and arguments from Leupold based on undeveloped claim  
19 construction positions.

20 We heard an argument about whether the actuator needs  
21 to be fully inside or outside of the scope, but the issue here  
22 is in the claimed invention the actuator and the cam are part  
23 of the knob. In the accused infringing product the alleged  
24 actuator is a different component inside the scope; it's not  
25 part of the knob.

1           And it gets into layers of claim construction in this  
2 undeveloped record we haven't gotten to, but just as an  
3 example, on slide 73 on the screen here is a description from  
4 the specification of the '907, explaining what the invention  
5 is, not what are embodiments of the invention, but what the  
6 invention is. And it was the idea of having the cam and the  
7 actuator together in the knob positioned above the housing.

8           So it says, from the specification here, "The focus  
9 control knob of the present invention" -- not of the  
10 embodiments, but of the invention -- "includes a cam hub  
11 mounted to the housing for rotation about an axis of rotation.  
12 The cam hub includes a drive face positioned facing the  
13 interior of the housing and a spiral cam track formed in the  
14 drive face around the axis of rotation and spiraling outwardly  
15 from the axis of rotation. An actuator slide positioned  
16 between the cam hub and the housing of the sight includes a  
17 cam follower slidably engaged with the spiral cam track."

18           It then goes on to talk about particular embodiments.  
19 But the description of what the focus control knob is, it  
20 includes those two components together and specifies that the  
21 actuator is positioned between the cam hub and the housing.  
22 And that's consistent with the claim language, where the  
23 actuator is part of the knob.

24           In the accused infringing products, it's not. It's  
25 this free-floating component on the inside that just the tip

1 of the bushing can interact with the under portion of the  
2 knob, but it's not part of the knob.

3 Again, that's just an example of where, you know,  
4 there's layers of record that we would have to go through to  
5 do claim construction, which in their cursory summary judgment  
6 motion Leupold did not do.

7 Along those lines, there's also two experts with  
8 opposing opinions on these points, not all of which have been  
9 resolved in the record here.

10 Turning to the date of invention, keeping in mind  
11 that Nightforce's position is there's no evidence of reduction  
12 to practice, we heard Leupold argue and give some quotes about  
13 some testing that might have been done. But the problem is  
14 they have no evidence of when that testing got done, and  
15 that's the problem in meeting their burden of proof.

16 Everything from the 1995-'96 date is tied to those  
17 invoices, which were first used to pollute Otteman's  
18 declaration, which were then shown to Landvatter. There's no  
19 evidence that any testing that might have been done was done  
20 prior to the German publication, and none of the quotes that  
21 you just saw put a date on it.

22 The burden of production on this issue was and is at  
23 all times Leupold's to show earlier invention. So they also  
24 raise the question about why, in their opening motion on  
25 validity, they didn't raise these issues. But they've had



1 the burden. So when they filed for a motion on validity of  
2 the '907, and they were aware of the German publication being  
3 the key prior art, they needed to show in that opening motion  
4 that there was reduction to practice, that a prototype was  
5 made in the relevant time period, and that it worked for its  
6 intended purpose in the relevant time period. They failed to  
7 do that.

8           Regarding testing, we heard a discussion of some of  
9 the case law. I encourage the Court to review the various  
10 cites. It's very clear riflescopes require testing, in view  
11 of all of the case law. How else do we know that? Leupold's  
12 expert, Byron, told us that. And Leupold's position across  
13 the board, before summary judgment, was that testing was  
14 required for the design of the '907 adjustment knob.

15           Last point on the earlier invention: Once again  
16 Leupold has pointed to conception, alleged conception evidence  
17 to suggest that a prototype was made and that it worked for  
18 its intended purposes. The drawings they use for conception  
19 don't show all the parts. They're not a prototype. They  
20 don't show a picture of the prototype. They don't tell us  
21 when or if a prototype was made. Mr. Landvatter never saw a  
22 prototype. There's just no evidence that a prototype was made  
23 or tested prior to the German publication.

24           Turning quickly to the estoppel issue, just a  
25 correction on the interpretation of the Central District of

1 California case. Mr. Brunette argued that it maybe shouldn't  
2 be followed as a decision because it imports the concepts of  
3 laches into its arguments and its holdings, and it's just  
4 simply not the case.

5 The Supreme Court got rid of laches because it was  
6 unnecessary, because the patent statute says you can only go  
7 back six years for damages. The Central District of  
8 California case is addressing that issue, that after you wait  
9 more than six years, the silence becomes not just regular  
10 misleading silence, but inexplicable misleading silence  
11 because you're giving up damages.

12 Absent the laches doctrine, that's also true.  
13 There's a six-year window of sliding damages. If you wait  
14 seven years to sue, you've given up a year of damages under  
15 the patent statute, not just laches.

16 That's all I have.

17 THE COURT: Thank you.

18 Anything else?

19 MR. BRUNETTE: Your Honor --

20 MR. CASIMIR: Oh, I'm sorry. Mr. Davis may have one  
21 quick point on the issues he raises.

22 THE COURT: Mr. Davis, I don't want to take away your  
23 moment in the sun.

24 MR. DAVIS: Thank you, Your Honor.

25 So just quickly responding to some of the points made

1 on the priority date motion, the unclaimed element argument  
2 that we keep hearing is simply inapt here, and especially the  
3 lens cap analogy. We're not talking here about adding an  
4 accessory to a scope having the spiral cam mechanism or a  
5 groove or a ridge or a rail. What we're talking about here is  
6 the claimed elements in the '907 patent of a cam track and a  
7 cam follower.

8 And the fact is that Leupold claimed in 2000  
9 iterations of cam tracks and cam followers that were not  
10 disclosed in 1999. And I provided examples on this slide 54  
11 for the Court, and there's never been an argument that any of  
12 these three examples is not within the scope of all of the  
13 asserted claims, including Claims 6 and 16, nor is there any  
14 express disclosure of such embodiments, including the later  
15 disclosed ridge or rail, in the 1999 application. Leupold has  
16 never seriously disputed there's no express disclosure of  
17 anything but the recessed groove in the 1999 application.

18 Then the issue becomes whether somehow a person of  
19 skill in the art, reading the 1999 application, would be able  
20 to see in that application what you and I cannot or something  
21 that's not there. And the answer to that could vary based on  
22 the disclosure and the art we're talking about here.

23 But this is not a battle of the experts as counsel  
24 argued. In support of Nightforce's summary judgment motion on  
25 this issue, we cited to no expert testimony from Nightforce's

1 experts because this is a burden of production on Leupold.

2 So the only issue in this motion is Byron's  
3 testimony, and there is nothing in Byron's testimony to  
4 support that Mr. Otteman possessed a ridge or rail or any  
5 other embodiment of a cam in 1999 that can be discerned by  
6 viewing the 1999 application. Byron's report is extremely  
7 conclusory on this.

8 If I might switch to the document camera --

9 (Pause) It's displaying on the camera.

10 (Off-the-record discussion between counsel and the  
11 clerk.)

12 MR. DAVIS: I have a copy I could hand up, Your  
13 Honor, if that would --

14 THE COURT: Sure.

15 We'll blame it on the government shutdown.

16 (There is a brief pause in the proceedings.)

17 MR. DAVIS: There is still money left for the  
18 document camera electricity after all, at least for a week  
19 maybe.

20 So I mentioned earlier in the argument Byron's report  
21 on this issue of the priority of the 1999 application, and the  
22 substance of it is highlighted here in its entirety from  
23 paragraph 332 of his declaration. The beginning portion of  
24 this merely recites what Mr. Brandenburg was arguing.

25 And then he goes on in this highlighted portion, at

1 ECF 83-2 at 149, to explain why he thinks that -- his opinion  
2 on the priority issue boils down to nothing more than a person  
3 of skill in the art would recognize that a spiral cam track  
4 that is a groove and a cam follower that is a rail is merely  
5 the inverse of a track that is a ridge or rail with a follower  
6 such as a fork that fits around the rail or ridge.

7           So whether a person would readily recognize that it's  
8 the inverse is exactly the obviousness standard I was alluding  
9 to earlier. He's not referring to the 1999 application and  
10 suggesting that there's any reason that a person reading that  
11 1999 application would believe not that it's obvious to do it  
12 a different way, but that this inventor, Otteman, was in  
13 possession of that alternative.

14           There's no tie in this report to the document in the  
15 1999 application. And why a person looking at that document  
16 would think that Mr. Otteman was in possession of the ridge or  
17 rail embodiment when it's not mentioned anywhere in the 1999  
18 application -- recognizing that a ridge is the inverse of a  
19 groove is an obvious observation, but that's not the test  
20 under *TurboCare* and other Federal Circuit cases.

21           So the 1999 application is simply not a disclosure of  
22 a ridge or a rail that was expressly disclosed in 2000.

23           Also, Mr. Byron's report here, which he swore to for  
24 the purpose of summary judgment, is simply too conclusory and  
25 entitled to no weight for summary judgment purposes. I

1 mentioned the *Arthur Collins* case earlier, and the *D Three*  
2 case that's come up a lot today also goes directly to this  
3 issue as well.

4           These conclusory assertions by an expert that the  
5 expert sees what we cannot in the four corners of a document,  
6 without any supporting analysis, effectively what the *D Three*  
7 Court says is there's no answer to the question "Why?" Why  
8 would a person reading the 1999 application think that this  
9 inventor was in possession of something that's not within the  
10 four corners of the document? It's just a conclusion he  
11 states without any supporting reasoning. And under Federal  
12 Circuit summary judgment law, it's entitled to no real weight.

13           And then I think there was also a question earlier  
14 about claim construction and how that interplays with the  
15 disclosure of the 1999 application. It's not for the experts,  
16 Your Honor, because this idea of a "groove" is in fact a claim  
17 term, and it's a term that happens to also appear in the 1999  
18 application. But interpreting that term in the claims is  
19 something Your Honor has already done for the purposes of this  
20 case. And the Court's construction inherently requires that a  
21 groove, ridge, and rail be separate and different things and  
22 that -- and there's no reason a different interpretation could  
23 be applied to the 1999 application. The Court construed a cam  
24 track as follows, quote: a groove, ridge, or a rail that is  
25 curved along its length, for engaging a cam follower, at ECF

1 69, page 21.

2 So the idea that a groove could inherently disclose  
3 or include a ridge or a rail in 1999, in that application, has  
4 no support and would be contradictory to the Court's -- the  
5 inherent impact of the Court's construction.

6 So even if we credit Byron's explanation here on the  
7 document camera that -- or his opinion that the idea of a cam  
8 being a ridge or a rail as the inverse and easily recognized  
9 as the inverse of a groove, that doesn't get them there for  
10 purposes of summary judgment. There's no explanation of why,  
11 and certainly no explanation of why a person of skill in the  
12 art could read the 1999 application and see something that's  
13 not within the four corners of the document, which is the  
14 test.

15 In the *Ariad* en banc decision from the Federal  
16 Circuit, the test is an objective inquiry into the four  
17 corners of the 1999 application, *Ariad*, 598 F.3d at 1531. And  
18 there is simply no basis to conclude that an objective reading  
19 of the 1999 application would disclose to a person of skill in  
20 the art or anyone else a cam that is not a groove.

21 And that's where their problem came in, because we're  
22 not talking about unclaimed elements. What we're talking  
23 about is a claimed element of a cam track and the claimed  
24 element of a cam follower. And there's been no real debate  
25 that cam tracks and cam followers that were not disclosed in

1 1999 are within the scope of the later claims in 2000, so  
2 there is no priority back to the 2000 application.

3 And lacking priority, there is no debate between the  
4 parties that without that priority claim being effective,  
5 giving them a filing date of 1999, the '907 patent and all of  
6 the asserted claims within it are invalid.

7 Any questions about this segment, Your Honor?

8 THE COURT: No. Thank you.

9 MR. DAVIS: Thank you.

10 THE COURT: Anything else?

11 MR. BRUNETTE: Your Honor, if I may respond very  
12 briefly.

13 THE COURT: Sure.

14 MR. BRUNETTE: I can just stand up and do it from  
15 here and save a second.

16 THE COURT: Whatever you like.

17 MR. BRUNETTE: So, first, with respect to the  
18 priority issue, a critical distinction is between the claim  
19 language that was construed, which says a cam track is a  
20 groove, ridge, or rail, and the fanciful embodiments that  
21 counsel has come up with that are up on the screen, which are  
22 a groove and a ridge, which would not fall within the claim  
23 language.

24 In other words, an additional element, whether that  
25 additional element is a second version of an existing element,



1 such as a second scope housing, a second groove, or a pair of  
2 fuzzy dice attached to the scope, whatever that additional  
3 element is, it is not required to be described within the  
4 specification. That's what the Federal Circuit said in  
5 *Lochner*, and there is no contrary authority.

6 Second, as to the Byron declaration, Byron asserts  
7 and applies the correct legal standard, and counsel simply  
8 disagrees with his conclusion. That is not a sufficient basis  
9 to enter summary judgment.

10 In addition, Nightforce's own expert,  
11 Mr. Brandenburg, admitted that cams have been known and  
12 applied in a variety of different ways for thousands of years,  
13 entirely consistent with Mr. Byron's testimony that a person  
14 of skill in the art would recognize that Mr. Otteman possessed  
15 both the groove and the ridge or rail embodiment.

16 Finally, Nightforce ignores the authority contrary to  
17 its position, such as the *Trading Tech.* or *Hologic* cases,  
18 which make clear that a single example can be sufficient to  
19 disclose an entire genus, such as the genus of single-click  
20 user input devices discussed in *Trading Technologies*. Thus,  
21 the single example of a groove is sufficient to disclose the  
22 genus of cam followers that also include ridges or rails.

23 Turning to infringement, counsel makes an argument  
24 that actuator is an issue that needs further development for  
25 claim construction before summary judgment can be decided.

1     However, that ignores that this Court has already construed  
2     the meaning of "actuator" in the '907 patent.

3             In any event, the specification example called out by  
4     Nightforce is not a limitation of the claims, and the claims  
5     are written more broadly than that example discussed in the  
6     specification. That is normal, and there is nothing wrong  
7     with that.

8             Finally, as to an invention and reduction to  
9     practice, under a rule of reason, there is ample evidence of  
10    when the prototype scope was tested. Mr. Landvatter testified  
11    that it was tested soon after his delivery of the prototype.

12            Mr. Landvatter also examined the financial documents  
13    and, after looking at them, agreed that they definitely  
14    related -- at least some of them related to the spiral cam  
15    product. And the 1995 undisputed electronic documents showing  
16    that Mr. Otteman created the drawings that were given to  
17    Mr. Landvatter in 1995 and that they were preserved unchanged  
18    a year later, in 1996, are all circumstantial evidence that,  
19    under a rule of reason, more than adequately corroborate the  
20    date of the testing.

21            Thank you, Your Honor.

22            THE COURT: Thank you.

23            Shall we move to the next topic?

24            MR. PARK: Sounds good, Your Honor. Thank you.

25            MR. CASIMIR: Now, we might want to have a discussion

1 about process.

2 How much more time do we have today?

3 THE COURT: My brain is probably good for another  
4 hour, a little bit more.

5 MR. CASIMIR: Okay. So the next one we had queued up  
6 was the set of five locking patents. It is impossible to get  
7 through those within an hour.

8 There are two patents, I think, in the case we could  
9 get through within an hour. One is the flip cap patent, which  
10 I'm not recommending we do. The damages in that one are a  
11 triviality. I believe their damages expert said it's worth  
12 \$80,000. Ours said that it's worth \$5,000. I don't know that  
13 we should prioritize that.

14 The other is the '067 patent. The issues are pretty  
15 simple. I think we could complete that within an hour. The  
16 other ones, we don't have a prayer.

17 THE COURT: Oh, okay.

18 MR. PARK: It seems like the five locking turret knob  
19 patents all deal with similar mechanical concepts. We have  
20 the three Windauer patents, and then we have the pinch turn  
21 and the ZeroLock.

22 We also have -- I agree that the flip-up lens cap  
23 probably does not need to be argued. It's also the subject of  
24 ongoing settlement discussions, which we hope will be  
25 completed soon. And then there is the government contract

1 defense that Nightforce has raised.

2 So depending on the Court's preference and the time  
3 we have, the government contract defense I think we could  
4 certainly get through today, both sides' arguments. I agree  
5 with Mr. Casimir that in terms of the locking turret knob  
6 patents, though, it would be aggressive, even if we took a few  
7 of them and tried to cleave those arguments.

8 THE COURT: You know more about how long everything  
9 is going to take than I do. You have an hour. It's your  
10 nickel. You get to spend it however you want.

11 MR. PARK: And, Your Honor, I know we talked about  
12 timing at the beginning of today's session. After the hour,  
13 both parties would understand that we're done with the  
14 argument.

15 THE COURT: I've got more time. If you need more  
16 time to finish up, I can give you another day. I had a couple  
17 of trials that went away, so that freed up some time. I think  
18 I have time in February to finish up. If you want, I can give  
19 you a date. You could look at your calendars right now.

20 That's what I like about federal court. Things open  
21 up.

22 Let's see. I think in the middle of February we had  
23 time.

24 THE CLERK: The 12th or 13th would be probably best.

25 (The Court and the clerk confer off the record.)

1 THE COURT: So I have time on -- it's a Tuesday and a  
2 Wednesday, the 12th and 13 of February.

3 MR. PARK: The 13th would work for us.

4 Would that work for you?

5 MR. CASIMIR: The 13th also works for me, yes.

6 MR. DAVIS: Yes.

7 THE COURT: So we'll schedule you at 9:00. I have  
8 the whole day. I hope we'll be finished in less than the  
9 whole day.

10 MR. PARK: Yes.

11 THE COURT: If not, that's fine. We'll give you the  
12 day.

13 MR. PARK: Okay. Thank you, Your Honor.

14 For purposes of today, shall we make progress on the  
15 government contract defense?

16 MR. CASIMIR: That's what we're thinking as well.  
17 That can definitely be done in the time period, and then it  
18 keeps related subject matter together.

19 MR. PARK: Sounds good.

20 THE COURT: Let's do that, then.

21 By the way, while you're walking up there, did you  
22 all get a time with Judge Beckerman yet?

23 MR. PARK: Not yet, Your Honor. We're working on it.

24 THE COURT: Okay.

25 MR. PARK: Mr. Brunette, if I could have you put up

1 docket 137 on the projector, please.

2 MR. BRUNETTE: It should be up, if you hit  
3 "Attorney 2."

4 MR. PARK: Thank you.

5 And if you could display, starting with page 3, that  
6 would be great.

7 For the record, I'm Brian Park on behalf of the  
8 plaintiff, Leupold & Stevens.

9 Your Honor, with respect to the government contractor  
10 defense that Nightforce has asserted under 28 USC Section  
11 1498, with the exception of fewer than a handful of sales,  
12 Nightforce asserts that its sales to the U.S. government enjoy  
13 a broad blanket immunity from patent infringement based on  
14 this concept of implied consent, and that's to be contrasted  
15 with the concept of express authorization and consent where a  
16 specific contract provision incorporates a provision of the  
17 FAR, the Federal Acquisition Regulations, specifically, for  
18 example, FAR clause 52.227-1. Where that clause is missing,  
19 the law requires that there be a sufficient showing of implied  
20 or implicit consent.

21 However, on their face, the vast majority of orders  
22 for which Nightforce claims immunity do not enjoy  
23 authorization and consent under the transaction's own terms.  
24 And in the Ferris declaration we have here on the projector,  
25 we have undertaken to go through a number of the transactions

1 for which Nightforce claims this immunity and explain why the  
2 authorization and consent is lacking; why the FAR clause is  
3 lacking; or, if there is a FAR clause that's invoked, why the  
4 thresholds required under the contract's own terms or the  
5 purchase order terms or the FAR clause terms aren't satisfied.

6 Now, in support of Nightforce's argument that FAR  
7 clause 52.227-1 is optional under the so-called simplified  
8 acquisition procedures that are used for many of Nightforce's  
9 government sales, the parties dispute legally what the term  
10 "optional" means in this context. "Optional" does not mean  
11 automatically immune or automatically applicable. It just  
12 means it can be included or not included. It doesn't have to  
13 be included. But, of course, if the authorization and consent  
14 provision is not included, then it's not applicable.

15 Nightforce also argues in its summary judgment reply  
16 brief on this issue that it would be somehow unfair for the  
17 government on the one hand to say that the authorization and  
18 consent clause is optional, but then on the other hand for the  
19 Court to find that such sales are not covered by this concept  
20 of implied authorization and consent under Section 1498(a).

21 But there's nothing unfair about that at all. Why?  
22 First, not every sale to the U.S. government is intended to be  
23 immune from liability. And the case law that both sides have  
24 cited make this abundantly clear. It's not an automatic  
25 immunity.

1           Two, there is no immunity if there are non-infringing  
2 alternatives to the patented technology. If the contract does  
3 not require that there be patent infringement, there's no need  
4 for immunity in the first place. And that's another reason  
5 why the FAR clause need not be included in the terms of the  
6 contract.

7           Now, authorization and consent can be implied, that's  
8 true. But the law requires more of a showing than merely a  
9 contract formation. It's not automatic. To meet that burden,  
10 Nightforce has to make the requisite showing, because the law  
11 has indicated that sovereign immunity, of course, is not to be  
12 taken lightly or to be liberally applied. The law states that  
13 waivers of sovereign immunity are actually to be strictly  
14 construed.

15           And this is discussed in the *Irwin v. Department of*  
16 *Veteran Affairs* case cited in the briefing, 498 U.S. 89, page  
17 94, from 1990. The law states that authorization and consent  
18 requires, quote, explicit acts or extrinsic evidence  
19 sufficient to prove the government's intention to accept  
20 liability for a specific act of infringement, end quote. This  
21 is from the *Larson v. United States* case, 26 Cl. Ct. 365, at  
22 pages 369 to 370, from 1992.

23           That makes sense. Otherwise, contractors would  
24 always enjoy blanket immunity on all deals with the  
25 government, and the U.S. government could be sued on any and



1 every commercial transaction it engages in. Plainly that's  
2 not the law and plainly that's not the government's intent.

3 So how does one tell the difference? If there is no  
4 applicable FAR clause that's built into or incorporated into  
5 the contract, how does one determine if there is authorization  
6 and consent or not? And that's exactly how the issue is  
7 joined by virtue of the three-prong test for implied  
8 authorization and consent, and that test is set forth in the  
9 *Larson* case from the Court of Federal Claims -- or, excuse me,  
10 the U.S. Claims Court.

11 Now, it's noteworthy that the U.S. Claims Court,  
12 which is now called the U.S. Court of Federal Claims, is the  
13 court with jurisdiction over lawsuits against the U.S.  
14 government for money damages, including for patent  
15 infringement. That specific court in D.C. deals with  
16 sovereign immunity issues all the time. It deals with  
17 authorization and consent issues all the time.

18 And under the *Larson* jurisprudence, the three-prong  
19 test for implied authorization and consent requires, first,  
20 that the government expressly contracted for work to meet  
21 certain specifications; second, that the specifications cannot  
22 be met without infringing the patent at issue; third, that the  
23 government had some knowledge of the patent infringement.

24 Again, conceptually this makes sense because if the  
25 government is going to be held to this standard of implied

1 authorization and consent, it needs to know what it's  
2 authorizing and consenting to, specifically some form of  
3 patent infringement.

4 Nightforce's attempt to distinguish the government  
5 contract cases cited in the briefing rings hollow. Under the  
6 Patent Act, a patent claim is infringed by any number of  
7 activities. It can be by making, using, selling, offering to  
8 sell, or importing an infringing device. Whether the  
9 infringer is contracting with the government to make and sell  
10 infringing products or to use the patented invention and  
11 infringe in that way is irrelevant. Instead, the key point is  
12 whether a private party is doing something by contracting with  
13 the government to do some act that infringes a patent; and, if  
14 so, is the three-part test that we just outlined satisfied?

15 To support ignoring the three-part test that -- thank  
16 you. To support disregarding the three-part test from *Larson*  
17 for implied authorization and consent, Nightforce relies on a  
18 number of unpublished decisions, decisions like the *Nasaka*  
19 case from the Eastern District of Virginia, 1994, or the  
20 *Racing Optics* case from the Middle District of North Carolina,  
21 2017.

22 Those cases highlighted by Nightforce in its briefing  
23 are distinguishable in a couple of respects. One key point is  
24 that the patentees in those cases sold the patent-infringing  
25 device only to the government and exclusively to the

1 government. The government was the only customer for the  
2 infringing device, and it was on an exclusive basis. And so  
3 there's logically a natural inference that by requesting that  
4 device and having it be sole sourced to the government and  
5 only the government, that authorization and consent can be  
6 implied.

7 And, by the way, another distinction from the *Nasaka*  
8 case is that the U.S. government's authorization and consent  
9 was not really in question because over the course of the  
10 dispute, a patent attorney working on behalf of the Pentagon  
11 reached out to the patent owner and said, "Hey, we see there's  
12 a patent infringement dispute here. If you want to do  
13 something about it, you need to sue in the Court of Federal  
14 Claims or initiate some sort of administrative action with  
15 respect to your patent rights."

16 So there is no question that the government knew  
17 about the patent infringement, wanted the patent infringement,  
18 and appeared to put the patent owner on notice that if the  
19 patent owner wanted a remedy, they needed to go after the  
20 government, a clear case of implied authorization and consent.

21 That, though, is not the case here. Here Nightforce  
22 sells the accused infringing products to many different  
23 customers, to the U.S. military and also to the private  
24 sector, through the commercial markets.

25 Further, there are eight separate patents-in-suit in

1 this case. There's been no showing from Nightforce that the  
2 government specifically wanted riflescopes that had all of the  
3 patented features. And those patented features, as we've  
4 discussed over the course of this case, deal with many  
5 different aspects of the riflescope technology.

6 Nightforce has also not shown that the government  
7 expressly requested the infringing product. That's prong 1  
8 from the three-part test I discussed.

9 Nightforce's government contracts are not in  
10 evidence. We have a bunch of purchase orders from its prime  
11 contractors for which it subs. And to the extent they don't  
12 exist, they can't be used to show that the government  
13 authorized implicitly some form of authorization and consent.

14 At most, what Nightforce has attempted to show is  
15 that the prime contractor, the contractor that formed the  
16 relationship with the government for whom Nightforce then  
17 subs, that the prime contractor issued a purchase order to  
18 Nightforce saying, "We would like you to supply us, the prime  
19 contractor, with a certain product that we can then use to  
20 fulfill the government's requirements." But, of course, a  
21 prime contractor can't implicitly authorize and consent to  
22 patent infringement on behalf of the government. Only the  
23 government can do that because it's a form of sovereign  
24 immunity.

25 In terms of prong No. 2 from the three-part test,

1 Nightforce also has not shown that the government requirements  
2 can't be met without infringing Leupold's patents-in-suit. In  
3 fact, there are many available technologies out there. And  
4 absent such a showing, there is no implied authorization and  
5 consent.

6 In terms of prong No. 3, Nightforce also has not  
7 shown that the government has any knowledge of the patent  
8 infringement, much less of this patent litigation. We don't  
9 know if Nightforce has informed the U.S. government of this  
10 patent dispute. And there's no evidence in the record that  
11 the government has known about it. Certainly they've not  
12 appeared and attempted to intervene or to notify Leupold, as  
13 in the *Nasaka* case, that there was a remedy elsewhere.

14 Absent those showings, there's a gaping hole in  
15 Nightforce's invocation of the government contractor defense.  
16 If there are situations where in fact there is express  
17 authorization and consent and all the criteria for that  
18 express authorization and consent are satisfied, then fine.  
19 And, as I mentioned at the beginning of my remarks, it appears  
20 there are two recent examples where that appears to be the  
21 case, and that's fine.

22 For the vast majority of the transactions here for  
23 which Nightforce is trying to invoke this shield, there's no  
24 such showing. There's no express FAR clause that's written  
25 into the contract. In fact, there's no contract that we have

1 seen that's in evidence. And there's no groundwork, no legal  
2 framework that's supported by competent evidence to apply  
3 implied authorization and consent.

4 And so for those reasons, summary judgment should be  
5 granted for Leupold on that defense, at least with respect to  
6 the contracts, the transactions for which Nightforce claims  
7 it's implied.

8 If there are no further questions or if there are no  
9 questions, Your Honor, I think I'll pass the mic to  
10 Nightforce's counsel. And then I'd like to reserve some  
11 rebuttal.

12 THE COURT: Fine.

13 MR. PARK: Thank you.

14 MR. CASIMIR: Mr. Davis will be making the argument,  
15 and I've got copies of his slides (handing).

16 THE COURT: Thank you.

17 MR. DAVIS: Your Honor, just to be clear for the  
18 record, this is an issue on which both parties have moved.  
19 Nightforce has moved for summary judgment that its government  
20 sales are immune, pursuant to Section 1498(a); and Leupold has  
21 moved against that defense on the theory that there's no  
22 evidence from which a reasonable jury could conclude the  
23 defense applies.

24 So for context, we ought to take a step back here and  
25 think about the argument that Leupold is making here, which is

1 surprising, given that they're a government contractor  
2 supplying the military as well.

3 So Nightforce's sales are exactly the kind of sales  
4 that this defense was meant to apply to. The genesis of  
5 Section 1498(a) was the 1918 Act passed as a result of the  
6 Secretary of the Navy complaining that there was a concern  
7 patent infringement allegations could prevent the Navy from  
8 getting the materials and supplies it needed, and they did not  
9 want threats of patent infringement to get in the way of  
10 national defense.

11 That Act was very similar to the current iteration in  
12 28 USC Section 1498(a), and these military sales are exactly  
13 what should be protected by it. If the Navy Seals and other  
14 special operations units who use Nightforce products  
15 specifically want and think that the Nightforce product is one  
16 they need, then 28 USC 1498(a) ought to make sure they get it  
17 without Nightforce having any concern about a patent  
18 infringement suit from Leupold, who no doubt would have liked  
19 to have made that same sale, but lost it to the superior  
20 Nightforce product.

21 It would be very scary to interpret the law as  
22 Leupold is advocating it, because it would essentially be an  
23 impediment to the implementation of 1498 and its predecessor,  
24 the 1918 Act, as Congress intended. There is no case that  
25 Leupold has cited that denies the defense of supplying

1 critical military and war supplies to the U.S. government and  
2 its military branches or its law enforcement, and those are  
3 exactly the sales that are at the core of Nightforce's motion,

4       There's a mention of express consent, and I guess  
5 there's no debate that those contracts that have the express  
6 consent clause are covered, and sales pursuant to those would  
7 be covered by the defense.

8       The big issue is implied consent. And the reason  
9 that's a big issue is Leupold complains that there's no formal  
10 contract to support those sales, to explain the government's  
11 motivation or what it knew about whether there was patent  
12 infringement. But that's the whole point of the simplified  
13 acquisition procedures that are used to purchase these kinds  
14 of supplies in relatively small quantities.

15       Simplified acquisition applies, per regulation, to  
16 sales under \$150,000. And almost all of Nightforce's sales to  
17 the U.S. government are that. They're for just a few scopes.  
18 If we look at slide 126, this is an example. It's for 120  
19 scopes. It's not a huge order. Most of these are used in  
20 relatively small quantities by special -- for very special  
21 purposes, special operations and the like.

22       Now, there's not a lot of detail in a typical order,  
23 but there is some information there that supports Nightforce's  
24 position. The government is telling us that these products  
25 must be certified for national defense use. They're mil spec



1 products. There was a suggestion that these products are sold  
2 to others. Mil spec generally is not sold by Nightforce to  
3 civilians or non-government entities.

4 THE COURT: Are these contracts that are directly  
5 with the government or -- is this an example of a contract  
6 that's directly with the government or is being filtered  
7 through a third party or can you tell from the exhibit?

8 MR. DAVIS: I honestly don't recall from this  
9 exhibit. This may well be one that's through a prime  
10 contractor.

11 THE COURT: And from your perspective, that doesn't  
12 matter. As long as it's a government contract, the purposes  
13 of the statute are met; and the prime contractor, as well as  
14 the subcontractor, is protected.

15 MR. DAVIS: Absolutely, Your Honor. The statute is  
16 clear and the implementing regulations are clear that the  
17 protection flows down to subcontractors, and that's the  
18 intent.

19 The three-part test that Leupold argues Nightforce  
20 can't meet isn't really relevant. Their own cases state  
21 exactly the point that we're making. There's a different test  
22 that they aren't mentioning. The three-part test is one way  
23 to show implied authorization and consent, but in the District  
24 Court decision of *Madey v. Duke*, 413 F.Supp.2d 601, at 609,  
25 "Implied authorization and consent will also be found where

1 the government requires the private contractor to manufacture  
2 the allegedly infringing device."

3 Nightforce submits that's exactly what happens here,  
4 because the government orders a specific Nightforce model  
5 number. I've highlighted it in blue here on Exhibit 127 for  
6 an order that went directly to the FBI from Nightforce. They  
7 specify the Nightforce Optics model C297 scope.

8 Now, it can't possibly be Leupold's argument that the  
9 FBI or another government agency, the special operations units  
10 of the military, don't know what specific model -- what comes  
11 in -- what features are in specific Nightforce models. That's  
12 exactly what the government wants, and that's exactly what  
13 Nightforce is obligated to deliver pursuant to these  
14 contracts.

15 It would be a breach of contract, Your Honor, if  
16 Nightforce received an order from a government agency for a  
17 model like C297 and changed it because of an alleged patent  
18 infringement problem to be something different for the  
19 government.

20 THE COURT: I think they're taking the position that  
21 they couldn't accept the negotiations in the contract in the  
22 first place if they know that you're selling an infringing  
23 product.

24 MR. DAVIS: The parties don't seem to agree on what  
25 the law is here, Your Honor.

1 THE COURT: All right. That's my job then.

2 MR. DAVIS: Yeah. Well, that the government need not  
3 know of or require the infringement, that's not the test. The  
4 implied authorization and consent applies whenever a specific  
5 product is ordered by the government and that's what's  
6 delivered. And if it happens to have features that are  
7 accused of patent infringement, if those are features the  
8 government wanted, then it's absolutely covered.

9 And we're talking here about on some of these  
10 contracts -- loosely called because they're such simple  
11 documents. Many of them are on what's called Form 1449, and  
12 there's very little to it. It looks more like a purchase  
13 order than anything else. There's not a lot of contract  
14 language. But that's the whole point of simplified  
15 acquisition, to make that speedy and get these things  
16 delivered to the people who need it.

17 On slide 126, the part description refers to the  
18 ZeeroStop elevation brake, which just happens to be an accused  
19 feature in this case. But it need not specify that. The  
20 point is the government knows what it's getting when they  
21 order a specific part number from Nightforce, and Nightforce  
22 is obligated to deliver it notwithstanding any possible  
23 allegation of patent infringement.

24 Just briefly, to distinguish one of their cases, the  
25 *TecSEC* case involving Adobe software, the issue in that

1 case -- first, it may well have been wrongly decided. The  
2 District Courts don't seem to apply 1498 in ways that can  
3 necessarily be perfectly harmonized. But, in any event, in  
4 that case the Court was concerned that the specific feature of  
5 this Adobe software wasn't necessarily even requested by the  
6 government.

7           These products are very different, Your Honor. As  
8 we've seen through the various presentations on the summary  
9 judgment motions on the merits, I mean, virtually every piece  
10 of this Nightforce product is accused of patent infringement  
11 in some way. They accuse lens caps. They accuse the  
12 adjustment knobs. They accused the pivoting lens unit inside.  
13 I mean, there's virtually nothing left, other than the housing  
14 or the fact that it's a riflescope. All of these features  
15 can't be taken out of a product to avoid patent infringement  
16 allegations when it's supplied and sold to the government, and  
17 the government knows that.

18           So this seems, to us, to be a clear case where  
19 implied consent ought to be found for each of the purchases by  
20 the U.S. government from Nightforce. And the record has a  
21 pile of these documents in it, amounting to several thousand  
22 Nightforce scopes.

23           But, you know, going back to the original point, the  
24 spirit and intent of this law, it simply can't be that the  
25 government can't, on a simple form, or even without maybe a

1 paper form but a handshake, get a specific specialized piece  
2 of equipment like one of these riflescopes for use by its  
3 special forces or law enforcement without negotiating or  
4 knowing about or inquiring about whether there's alleged  
5 patent infringement. It's simply not a requirement that they  
6 know of any alleged patent infringement. It simply is enough  
7 that they order a specific product and that's what's  
8 delivered.

9 And that's exactly what the Act of 1918 and the later  
10 1498 was meant to allow for, so that our military and our law  
11 enforcement agencies can get the equipment they need without  
12 any threat of patent infringement getting in the way.

13 THE COURT: Is there something in the documents that  
14 came through third parties to your client that would alert  
15 them that what they were ordering was, in fact, for the  
16 government? I mean, is that -- is that even a necessary  
17 requirement, or that it happens to be for the government gives  
18 them protection?

19 MR. DAVIS: So I think, Your Honor, you're asking  
20 about the sales that go through a primary contractor to the  
21 ultimate government purchaser.

22 So the way those really work is -- as outlined in the  
23 Bill Bracken declarations that we've submitted with this  
24 issue, what really happens is it may be funneled through a  
25 larger prime contract, a single smaller purchase, but this is

1 what the military does apparently. You know, they'll issue  
2 like a large contract for tens or hundreds of millions of  
3 dollars to a select number of prime contractors, and they get  
4 what they need. They literally have a catalog of stuff, and  
5 they get what the government orders from the subs.

6 But the greater point is do they know where it's  
7 coming from and going? Oftentimes, as Bill Bracken explained,  
8 what happens is the ultimate purchaser, like Navy Seals, for  
9 example, are in direct contact with the salespeople at  
10 Nightforce, and it's just an expediency that the actual money  
11 is flowing through a prime contract.

12 So the government knows exactly what they're  
13 ordering. The prime contractor knows what's happening,  
14 obviously. And Nightforce ultimately gets paid via the prime  
15 contract. But the government is effectively ordering the  
16 specific model number directly from Nightforce. It's just  
17 being paid via contract.

18 THE COURT: But if the prime contractor is somebody  
19 who has an existing relationship with the subcontractor and on  
20 a continuing basis is ordering the same thing -- and I don't  
21 know if I'm describing reality or not.

22 But if that's the reality, it might make some  
23 difference to me -- again, I'm going to go and read the  
24 statute and do statutory interpretation, right. But it might  
25 make some difference to me if the subcontractor, your client,

1 knows and is aware that really the ultimate purchaser in this  
2 case is the government: "I don't need to worry about  
3 infringement because I'm actually selling to the government,"  
4 as opposed to "I'm selling to a prime contractor and I have no  
5 idea where those scopes are going, whether it's to the  
6 government or not."

7 Now, I don't know whether ultimately, when I'm  
8 deciding this issue, that will make a difference or not. And  
9 I don't know whether that evidence is something that exists in  
10 the record or not. But I'd like you to address that point.

11 MR. DAVIS: Absolutely, Your Honor. It's a great  
12 point.

13 And absolutely Nightforce knows where its scopes are  
14 going. And they know exactly the special operations unit,  
15 branch of the military, law enforcement agency. They know  
16 that these sales are ultimately being delivered to the United  
17 States government.

18 THE COURT: And is that something I can figure out  
19 from the record as it exists presently before this Court?

20 MR. DAVIS: I believe that's set forth in Bill  
21 Bracken's declaration, how it works. Because they went  
22 through, and it's -- because a lot of these contracts are  
23 relatively small, it's quite an exercise. There's a lot of  
24 paper, and I apologize for that, Your Honor. There are large  
25 binders with all of this.

1 But Nightforce went through and they identified every  
2 one of these sales that we put into the record. They went  
3 back and they -- you know, they had personal knowledge. Even  
4 if they didn't have a paper documenting it, they had personal  
5 knowledge of -- that each of these particular sales was  
6 destined for a U.S. government purchaser.

7 THE COURT: Okay. Thank you.

8 MR. PARK: Brief response, Your Honor?

9 THE COURT: Sure.

10 MR. PARK: Your Honor, the simplified acquisition  
11 procedure is not synonymous with automatic immunity, automatic  
12 sovereign immunity. Sure, the government can use the  
13 simplified acquisition procedures to expedite the provision of  
14 goods and services to satisfy its needs. That's a different  
15 issue, though, about whether or not that carries the legal  
16 implication of being subject to patent infringement liability  
17 for the contractor that fulfills the contract or not, or  
18 whether the patentee has to go to the Court of Federal Claims  
19 to seek a remedy for the patent infringement.

20 So simply because the SAP, that simplified procedure,  
21 is used doesn't -- that's not synonymous with "You can't sue  
22 us. We have a 'get out of jail free' card." In fact, clearly  
23 not all government contracts are subject to this sovereign  
24 immunity, this government contractor defense.

25 The question is whether the contract requires each of



1 the patents-in-suit or -- one question is -- or whether there  
2 are non-infringing alternatives. If that weren't the case, if  
3 it were so simple as Nightforce says, then there wouldn't be  
4 any need for FAR clause 52.227-1. It would automatically  
5 apply as soon as the government enters into a contract to be  
6 provided with goods or services.

7 Nightforce also raises the issue of flow-down  
8 provisions. Leupold agrees that where applicable, flow-down  
9 provisions that go to the prime contractor flow down and apply  
10 to the subcontractor. That's the law. We don't dispute that.  
11 The issue, though, is there has to be something to flow down.  
12 It's not just a matter of contract formation.

13 So, for example, Nightforce has used in one of its  
14 demonstratives, on slide 126 of Nightforce's presentation,  
15 docket 96-13, which I've marked with my arrow here, this was  
16 one of the government contracts -- government orders discussed  
17 in Mr. Ferris's declaration.

18 Under the flow-down column in the middle of this  
19 chart, Nightforce was arguing that "Here's a government order  
20 that was fulfilled. Flow-down applies. Therefore, we're  
21 immune."

22 The evidence shows, when we actually go and look at  
23 what the flow-down provision is, it's not a FAR clause  
24 regarding sovereign immunity or government contractor immunity  
25 at all. It's the code of conduct to the primary contractor,

1 which in this case was ADS; the code of conduct meaning, you  
2 know, "We're an equal opportunity employer. We don't tolerate  
3 certain types of behavior. These are your obligations in  
4 terms of disclosure because we have business with the  
5 government."

6 It doesn't talk about 52.227-1. It doesn't talk  
7 about authorization and consent for patent infringement. And  
8 so in that example, there's no -- there's no immunity that  
9 applies.

10 If, for example, the flow-down provision were  
11 otherwise, if the flow-down provision said, boom, "Here is  
12 authorization and consent," we would be having a different  
13 discussion, but that's not the case.

14 In addition -- would you mind going back to slide  
15 126, please.

16 Nightforce has put up this transaction as another  
17 example of one that is subject to implied authorization and  
18 consent.

19 Now, to clarify the record, the ZeroStop functionally  
20 here is not accused of patent infringement in this case.  
21 Nightforce actually owns its own patent on the ZeroStop.  
22 That's a different technology. That's not to say that other  
23 features of the riflescopes that Nightforce chose to fulfill  
24 this transaction with may be accused of infringement. But in  
25 terms of the ZeroStop, it's a different technology than

1 Leupold's ZeroLock.

2 At the *Markman* hearing, the Court may recall the  
3 difference between a stop and a lock in terms of securing a  
4 device, a knob, against inadvertent rotation in two directions  
5 as opposed to just one direction.

6 So I make that point for two reasons: one, to  
7 clarify the record; secondly, the fact that in this example  
8 that Nightforce uses, this is not an example of the government  
9 asking for specific patented technology from Nightforce to  
10 fulfill a contract. This is an example of Nightforce deciding  
11 which of its technologies it's going to use in connection with  
12 this particular transaction.

13 Your Honor is correct that at the end of the day, the  
14 Court needs to resolve the legal dispute between the parties.  
15 And the parties disagree about what the legal framework is.  
16 A number of the District Courts come to different conclusions.

17 I think it's helpful, though, to keep in mind the  
18 fundamental guiding principle of sovereign immunity.  
19 Sovereign immunity is not to be liberally construed, much less  
20 inferred. It has to be strictly construed. And in instances  
21 where it's appropriate, there has to be a legal -- either an  
22 express legal predicate or some sort of implicit authorization  
23 and consent based on the facts of that particular situation.  
24 It should be the exception rather than the default rule.

25 THE COURT: On all the cases that you are claiming

1     there was infringement based on this structure where there was  
2     a primary contractor who was in an agreement with the  
3     government, who then turned around and purchased scopes from  
4     the defense, do you believe that, while you may not assert  
5     them, that you have claims against the primary contractor as  
6     well, or is the analysis different as between the primary  
7     contractor and the subcontractor?

8             MR. PARK: That's a good question.

9             THE COURT: I like good questions.

10            MR. PARK: The answer, I think, depends on the same  
11     factual considerations about whether the government, when it  
12     was requesting product from the prime contractor or the  
13     primary contractor, whether it basically said, "We need  
14     riflescopes," and the prime contractor decided to fill the  
15     order with infringing riflescopes as opposed to one of the  
16     non-infringing alternatives.

17            Similarly, that same concept, as we've been using the  
18     concept "flow down," would flow down to the subcontractor. So  
19     if there is a government contract --

20            THE COURT: Well, but let me interrupt you there for  
21     a second.

22            So my question is if liability lands with Nightforce,  
23     why wouldn't it also be landing with the primary? Why would  
24     there be a difference in analysis?

25            MR. PARK: It could. Liability could land with both

1 if neither of them enjoyed authorization and consent.

2 THE COURT: But in order for them to have  
3 authorization and consent, that's going to depend on the same  
4 circumstances as between the government and the primary than  
5 as between the primary and Nightforce, would it not?

6 MR. PARK: Yes.

7 THE COURT: So it seems to me that in every case that  
8 you are claiming that Nightforce has liability, then, unless  
9 you can give me kind of weird examples, it seems to me that  
10 also that primary contractor would also have liability.

11 MR. PARK: That's possible.

12 THE COURT: You haven't really thought through that  
13 yet maybe.

14 MR. PARK: Well, I think the answer is the  
15 subcontractor should not be treated differently or specially  
16 just because they're a sub. If Nightforce were the prime  
17 contractor, the analysis would be the same. If Nightforce was  
18 the subcontractor for a prime contractor, the analysis is the  
19 same.

20 The question is whether between the government and  
21 the contracting parties there's been either express  
22 authorization and consent or implied authorization and  
23 consent.

24 THE COURT: I just can't think of an example where  
25 you would have liability that exists with Nightforce where it

1 wouldn't exist as regards the prime contractor. It seems to  
2 me that in every case, given the way you're looking at the  
3 statute, that if Nightforce is liable, that the prime would  
4 also be liable.

5 MR. PARK: I think that's right, except here  
6 Nightforce's liability goes far beyond the prime contractor's  
7 liability because they've been selling vast amounts of  
8 riflescopes into the private market as well.

9 THE COURT: That's separate, though, right? We're  
10 just talking about the government contracts here. I'm not  
11 talking about the rest of your case. I'm talking about just  
12 this issue.

13 MR. PARK: No, I think you're right. Although there  
14 would be a question about remedies, harm, whether there are  
15 double damages, issues we haven't thought of for purposes of  
16 this case.

17 THE COURT: I'm not talking about damages either.  
18 I'm only talking about issues of liability.

19 MR. PARK: I think the Court is correct.

20 THE COURT: Okay. You can think about that some  
21 more.

22 MR. PARK: Right. I think that goes to the nature of  
23 the flow-down concept.

24 THE COURT: Right.

25 MR. PARK: The flow-down concept is that prime and

1 sub enjoy the same legal position, whatever that may be.

2 THE COURT: Okay. Thank you.

3 MR. FERRIS: If I may, Your Honor?

4 THE COURT: Who are you?

5 MR. FERRIS: Kassim Ferris for the plaintiff.

6 If I may, Your Honor, just to supplement the question  
7 you're asking about, if there is no implied authorization and  
8 consent and only express authorization and consent between the  
9 government and the prime contractor, but no flow-down  
10 provision in the contract between the prime and subcontractor,  
11 then that might be a situation where the subcontractor would  
12 carry liability, but the prime would not.

13 Does that make sense?

14 THE COURT: It makes sense, although I can't imagine  
15 how that would happen, but it makes sense.

16 Thank you.

17 MR. FERRIS: All right.

18 MR. DAVIS: If I might, Your Honor, briefly,  
19 Nightforce is not arguing that there's automatic applicability  
20 of 1498. We don't need to.

21 The cases that really wrestle with whether 1498  
22 applies generally do have fact patterns where the government  
23 contract is fairly non-specific for goods and services, and  
24 there might be -- and the question sometimes Courts ask is:  
25 Was there flexibility in how the contract was fulfilled or did

1 the contractor necessarily need to infringe the patent?

2 That's not this case. Very specific models of  
3 Nightforce scopes are being ordered by the government.

4 And, I mean, going to this issue also of whether  
5 there are non-infringing alternatives, it's not -- that's a  
6 separate damages question for lost profits. I don't think  
7 that has any applicability here, whether there are  
8 non-infringing alternatives or non-infringing ways to comply  
9 with the contract.

10 But, again, while that's an interesting question some  
11 Courts have to grapple with, this Court need not because the  
12 government is ordering very specific Nightforce products.

13 And then the question is, well, could the government  
14 have ordered maybe a different Nightforce product or maybe a  
15 non-infringing one? Well, that question need not be answered  
16 here because Leupold accuses every single Nightforce scope  
17 ever made, which goes to the prior art on the '305 patent.  
18 But every single Nightforce scope is, in their view, within  
19 the scope of their patent.

20 So it's not like it depends on which model number the  
21 government is ordering. If they're ordering a Nightforce  
22 scope -- and they're doing it very specifically by model  
23 number. But in any event, any of these Nightforce scopes are  
24 accused of patent infringement by Leupold.

25 There was a mention of the particular contract that's



1 shown here on slide 126, and apparently counsel clicked on the  
2 link and found that the flow-down -- the language of the  
3 flow-down provision didn't actually show up. It went to a  
4 code of conduct or something like that.

5 But whether the prime contractor at present has a  
6 broken link on its website should not be a concern for  
7 deciding this case. The contract at issue, as many of them do  
8 with this contractor, prime contractor ADS, at ECF 96-13, at  
9 the bottom it says, "The terms and conditions found at" --  
10 then the website link -- "adsinc.com/po-flowdowns are hereby  
11 incorporated into this Purchase Order by reference." If that  
12 link happened to be broken and didn't go to flow-down  
13 provisions but went to a code of conduct when counsel  
14 investigated that, that should have nothing to do with whether  
15 this defense applies here.

16 The government knew what it was ordering and it got  
17 what it ordered, and Nightforce had no option but to fulfill  
18 its contractual obligation to provide to the government scopes  
19 that were accused of infringement by Leupold, and we know that  
20 because every scope that Nightforce makes is accused of  
21 infringement by Leupold.

22 THE COURT: Thank you.

23 MR. PARK: Just briefly, Your Honor, there seems to  
24 be this fundamental disconnect. The starting point and the  
25 ending point of this analysis is this is an affirmative

1 defense. Nightforce bears the burden of proving this defense.

2 To that point, the key issue is whether Nightforce  
3 put evidence into the record about underlying government  
4 contracts. And so as described in the Ferris declaration, in  
5 the second column from the right, everywhere this is marked  
6 "no," there is no underlying government contract. There is no  
7 predicate in the record from which immunity could flow down.  
8 That's the point of this table on this page and the following  
9 page of the Ferris declaration.

10 Thank you.

11 THE COURT: So the contracts aren't in the record in  
12 enough detail or the contracts aren't in the record for me to  
13 understand whether or not they're government contracts or not  
14 that have the provisions of the statute contained therein?

15 MR. DAVIS: That is correct, Your Honor. As to some  
16 of the prime contracts, the prime contractor did not provide  
17 them to Nightforce.

18 What we do have, though, is evidence in the form of  
19 testimony from the Nightforce salespeople linking the specific  
20 sales transactions to the known government purchaser.

21 THE COURT: Okay. Thank you.

22 That's all for today. We gave you a new date and a  
23 new time for us to finish up.

24 Is there anything else we need to talk about before  
25 we stop for the day?

1 First from plaintiff's perspective?

2 MR. PARK: No, Your Honor. Thank you.

3 THE COURT: Thank you.

4 From the defense perspective?

5 MR. CASIMIR: No.

6 MR. DAVIS: No, Your Honor.

7 THE COURT: All right. Until next time.

8 Thank you. We're in recess.

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11 (Proceedings adjourned.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-titled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

*/s/ Nancy M. Walker*

*1-18-19*

\_\_\_\_\_  
NANCY M. WALKER, CSR, RMR, CRR  
Official Court Reporter  
Oregon CSR No. 90-0091

\_\_\_\_\_  
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